Supreme Court, U.S.
FILED
04 292 AUG 26 2004
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

ICE EMBASSY, INC., *et al.*,

Petitioners,

vs.

CITY OF HOUSTON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI and APPENDIX VOLUME I, Pages 1 to 62

JOHN H. WESTON*
G. RANDALL GARROU
CATHY E. CROSSON
JEFFREY F. ALLEN
WESTON, GARROU & DEWITT
12121 Wilshire Blvd., Suite 900
Los Angeles, California 90025
(310) 442-0072

Attorneys for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Consistent with the First Amendment, may the permissible locations for adult businesses be repeatedly changed to eliminate the vast majority of existing businesses with each new enactment, without either compelling justifications or an exemption for pre-existing businesses established in reliance on the prior zoning scheme?

2. When an adult zoning ordinance is amended to expand required separation distances, such that the vast majority of existing adult businesses are eliminated, must the increases be justified by evidence of their necessity to combat adverse secondary effects at these greater distances, in order not to violate the "proportionality test" Justice Kennedy articulated as the narrowest holding of the Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)?

3. Does a speech-licensing regulation facially violate the First Amendment if it prohibits adult business entertainers and managers from working without a required permit, even after the licensor has failed to act on their permit applications within the prescribed time limits?

LIST OF PARTIES

(Pursuant to Rule 14.1(b))

Petitioners. The following are the Petitioners herein, all of whom were represented by undersigned counsel in both the court of appeals and the district court, and each was an intervenor plaintiff in the district court and an appellee-cross appellant in the court of appeals:

> Ice Embassy, Inc., Texas Richmond Corporation, HFR Enterprises, Inc., Andrea Stafford, Andrea Allbright Marco, Naomi L. Parrish, Ann Marie Hasselbach, Jeanne L. Grigsby, Susan Boyle, Dana Lynn Thomas, Kimberly Ann Dushman, Michelle Hadley, Colleen Cloer, Leah Marie Wilson, Carla K. Eaton, Andrea Hill, Gina Oliver, Heather Weldin, Charisma Barry, Donna Soto, Cheryl Thompson, Robert G. Furey, and Frank I. Kent.

Neither Ice Embassy, Inc., Texas Richmond Corporation, nor HFR Enterprises, Inc., is owned by any parent company, nor has any non-wholly-owned subsidiary company.

Principal Respondent. Respondent City of Houston, a political subdivision of the State of Texas, is the sole defendant in the district court proceedings, and was an appellant and cross-appellee in the court of appeals.

Other Respondents. The remaining parties in the court of appeals were all either plaintiffs or intervening plaintiffs in the district court. Petitioners are informed and believe that no other such parties will be seeking review as petitioners in this Court. Specifically, the following entities were parties below and have *affirmatively*

LIST OF PARTIES – Continued

indicated, through counsel, their intention *not* to participate in the proceedings before this Court (and, pursuant to Rule 12.6, additional notice of this is provided to the Clerk and all counsel under separate cover):

Two of the "Weston, Garrou & DeWitt Plaintiffs": FTU, Inc. and Dajo, Inc.

All the "Gerald Hopkins Plaintiffs": N.W. Enterprises, Inc., Amethyst Enterprises Incorporated, Campus Investments, Inc., 1431 West 18th, Inc., Vista Video Corporation

All the "Joseph M. Grant Plaintiffs": A.H.D. Houston, Inc., a Texas Corporation d/b/a Centerfolds; D. Houston, Inc., d/b/a Treasures; D.N.W. Houston, Inc., a Texas Corporation d/b/a Gold Cup; Parabar Co., d/b/a Paradise Club; Jane Doe One; and Jane Doe Two

All the "John Fahle Plaintiffs": Dee & Dee Enterprises, Inc., d/b/a 7700 Pinemont, Suite F., 8213 Gulf Freeway; 9924 I-45 North, Inc., d/b/a 9924 I-45 North; Hi-Houston, Inc., d/b/a 6431 Hillcroft; and Charles Wesley, Inc., d/b/a 5821 Hillcroft, 14905, So. Main

All The "Philip Boyko Plaintiffs": Mark Thai Do d/b/a Dong Kyong Modeling Studio and Norman S. Harrison

The "Paul Decuir Plaintiff": D.S.S.S. Aria America, Inc., d/b/a Solid Platinum

The "John Hill Plaintiff": Elgin Investment Company, LTD, d/b/a French Quarter Theater

LIST OF PARTIES – Continued

All the "Nelson Hensley Plaintiffs": Chil Soung, Inc. d/b/a BJ's 24 Hour Newstand; Daris, Inc. d/b/a Riviera Cabaret; GNCD, Inc. d/b/a Fantasy South; Rude Dog II, Inc. d/b/a Scores Cabaret; Lone Starr MultiTheatres, Inc. d/b/a Cinema West; AVW, Inc. d/b/a Adult Video Megaplexxx; C.L.M.S., Inc. d/b/a 24 Hour Video & News; G-Snap, Inc. d/b/a Interludes; East Bay, Inc. d/b/a East Tex 24 Hour News and Video d/b/a Hempstead Adult Book Store d/b/a World News Stand d/b/a X.T.C. Cabaret Center; TNT Services, Inc. d/b/a Xcalibur; 9834 Jensen, Inc. d/b/a Harlem Knights; 8503 North Freeway, Inc. d/b/a Fantasy Cabaret; Corporate Clubs of Texas, Inc. d/b/a Fantasia I XTC; US Clubs, Inc. d/b/a Fantasia III XTC; XTC Cabaret, Inc. d/b/a XTC; DLH, Inc. d/b/a Executive XTC; Cherie Feldman d/b/a Executive Playmates; Eve Enterprises, Inc. d/b/a Club Royale; Long Tran d/b/a Ellington Newstand; Nien X. Nguyen d/b/a D.T. Video; W.M.F. Investments, Inc. d/b/a Chesapeake Bay; A.K.M., Inc. d/b/a GiGi's Cabaret; DHR, Inc. d/b/a Hi-10 Cabaret; Panah, Inc. d/b/a Mirage Cabaret; R&R Entertainment, Inc. d/b/a Moments Cabaret; S.S.D. Enterprises, Inc. d/b/a Ritz Cabaret; H.H.E., Inc. d/b/a Passion Cabaret; F&R Club, Inc. d/b/a Silk Bar & Grill Cabaret; ATCOMM Services, Inc. d/b/a Broadsteets Cabaret; Houman Shaghagi d/b/a Foxxy's Cabaret; Southeast Texas Ventures d/b/a The Trophy Club; KMRC, Inc. d/b/a LaChatte Gentlemen's Club; Aris Mylonas, d/b/a Baby Dolls Saloon; M.K. Club and Restaurants, Inc., d/b/a Moulin Rouge; 10128 TDC #1, Inc., d/b/a Texas Dolls Cabaret; Southwest Clubco, Inc., d/b/a Playmates; Duncan

LIST OF PARTIES – Continued

Burch, Inc., d/b/a Michael's International Obsession Cabaret, Inc., d/b/a Obsession Cabaret; Norman R. Glenn d/b/a West Mt. Houston Newstand d/b/a Far West News d/b/a Highway 6 Newstand; James Drew, d/b/a The Gold Touch Stress Clinic and The Velvet Touch Stress Clinic; Pete Caserly d/b/a Northwest News; A TO X Video Outlet, Inc., d/b/a Pacific Management Enterprises, d/b/a 10006 Gulf Freeway; Hughes & St. Clair, Inc. d/b/a I-10 Newstand, d/b/a Pacific Management Enterprises; Quasar International Inc., d/b/a Pacific Management Enterprises; North Freeway News & Video; Video News, Inc., d/b/a/ Pacific Management Enterprises; Chuck Wesley d/b/a Pacific Management; Chuck Wesley, Inc.; Jacob Borenstein d/b/a Northwest News; 12851-59 Westheimer, Inc.; 608 West Mt. Houston, Inc.; Gino A. Barone d/b/a Ban Management, Inc., aka Consolidated Video d/b/a Hillcroft News & Video, d/b/a Telephone Road News & Video; Heaven Video & News; Airline Video and Thai Company; City Wide Group, Inc. d/b/a Studz News; A.N.S., Inc. d/b/a Lone Star News; Northstar, Inc. d/b/a North Freeway News; Northeast, Inc. d/b/a Gulf Freeway News; Eastex 24-Hour Newstand; G.W. Rogers; R. Glass; G. Humphrey; D.L. Stoneham; L.J. Putterman; M. Roberts; L.V. Auzston; A. Lucke; J.J. Langan; H. Perez; B. Webb; Y. Hnojosa; A.N. McMillen; R. Sternes; S. Mongonia; V. Gobea; K. Martin; N. Roberts; D. Quick; K. Warren; R. Sanchez; S. Jurek; N. Espinosa; C. Emery; C. Combs; J. Dampier; L. M. Bates; A. Cook; W. Kalinowski; J. Crenshaw; H. MacTavish; T. Dove; E. Castillo; K.K. Hannan; C.J. Sharpe; N. Bailey; T.R. King; L.B. Meagher;

LIST OF PARTIES – Continued

N. Henry; A. Bailey; D. Dodson; J. Suarez; C. Garcia; K. Rosenberry; M. Fisher; D.M. Muenzler; T.J. Oakley; D. Carswell; A. Kelly; KA. Rader; T. Western; L. Phillips; T. Jones; A. Gibson; G. Pierce; T. Allen; N. Neuenfeldt; P.A. Buffin; S.L. Whittenburg; C. Vaughn; T.L. Aldape; S.Y. Noreno; L. Tauarez; T. Dardas; N. Barry; T. Standride; J.D. Burden; S.S. Salazar; H.L. Lococo; S. Brady; S. Nnoli; E. I. Street; D. Jorgenson; D.G. Lewis; P.Z. German; J.M. Rogers, Jr.; B. Templemire; R. Duncan; J. Easterwood; J.C. Acres; W. Templemire, Jr.; Trumps, Inc., d/b/a Rick's Cabaret; and Andrew Sefia, d/b/a Rumors

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	vii
TABLE OF AUTHORITIES	x
RELEVANT OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
Historical Background	5
REASONS FOR GRANTING THE WRIT	16
1. In rejecting Petitioners' challenge to Houston's "shell game" pattern of repeatedly changing the permissible locations for adult businesses and, each time, terminating all businesses thereby rendered nonconforming, the court of appeals has rendered a decision in conflict with the "reasonable opportunity" requirement recognized by this Court in *City of Renton*, and such ruling raises an important question of federal law that should be settled by this Court in any event regarding the standard of review for analyzing such ordinances	16

TABLE OF CONTENTS – Continued

Page

2. The court of appeals has entered a decision in conflict with this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and with the decisions of the Seventh, Ninth and Eleventh circuits regarding the proper interpretation and scope of the "proportionality analysis" applicable to content based "adult zoning" restrictions, as articulated in Justice Kennedy's controlling concurring opinion in that case 20

A. Conflict with *Alameda Books* 20

B. Conflict with opinions in the Seventh, Ninth and Eleventh Circuits 22

3. The court of appeals has entered a decision in conflict with decisions of the Eleventh Circuit regarding procedural deficiencies in permit requirements for adult business workers 25

CONCLUSION 30

APPENDICES

Appendix A Fifth Circuit Court of Appeals Opinion (November 25, 2003) .....App. 1

Appendix B District Court Amended Memorandum Opinion and Order of June 9, 1998 [Amending Opinion of February 18, 1998] .....App. 63

Appendix C District Court Supplemental Memorandum Opinion And Order of June 11, 1998 [Initial Decision on Reconsideration].....App. 300

TABLE OF CONTENTS – Continued

		Page
Appendix D	District Court Memorandum Opinion And Order Regarding Conspicuous Display Requirement of August 7, 1998 [Additional Supplemental Opinion on Reconsideration]	App. 432
Appendix E	Fifth Circuit Opinion on Rehearing (May 28, 2004)	App. 445
Appendix F	Houston Ordinance No. 97-75	App. 455
Appendix G	Houston Ordinance No. 86-323	App. 491
Appendix H	District Court's Order Of Severance of August 28, 1998	App. 508
Appendix I	District Court's order of Final Judgment of August 31, 1998	App. 509

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Artistic Entertainment, Inc. v. City of Warner Robins,
223 F.3d 1306 (11th Cir. 2000) 26, 27, 28

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 19

Center For Fair Public Policy v. Maricopa County,
336 F.3d 1153 (9th Cir. 2003) 22

City of Littleton v. Z.J. Gifts D-4, L.L.C.,
___ U.S. ___, 124 S.Ct. 2219 (2004) 30

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) ..... *passim*

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) ..... *passim*

Encore Videos, Inc. v. City of San Antonio (Encore I),
310 F.3d 812 (5th Cir. 2002) 24

Encore Videos, Inc. v. City of San Antonio (Encore II),
330 F.3d 288 (5th Cir. 2003) 25

Fly Fish, Inc. v. City of Cocoa Beach,
337 F.3d 1301 (11th Cir. 2003) 18, 28

Freedman v. Maryland,
380 U.S. 51 (1965) 11

G.M. Enterprises, Inc. v. Town of St. Joseph,
350 F.3d 631 (7th Cir. 2003) 23, 24

Kev, Inc. v. Kitsap County,
793 F.2d 1053 (9th Cir. 1986) 26

Lady J. Lingerie, Inc. v. City of Jacksonville,
176 F.3d 1358 (11th Cir. 1999) 18, 28

TABLE OF AUTHORITIES – Continued

Page

Marks v. United States,
430 U.S. 188 (1977) 20

N.W. Enterprises, Inc. v. City of Houston,
27 F.Supp.2d 754 (S.D. Tex. 1998) 1, 11, 12, 17

N.W. Enterprises, Inc. v. City of Houston,
352 F.3d 162 (5th Cir. 2003).....1, 12, 13, 14, 15, 22

N.W. Enterprises, Inc. v. City of Houston,
372 F.3d 333 (5th Cir. 2004) 1

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 19

Peek-A-Boo Lounge v. Manatee County,
337 F.3d 1251 (11th Cir. 2003) 24, 25

R.V.S., L.L.C. v. City of Rockford,
361 F.3d 402 (7th Cir. 2004) 24

Redner v. Dean,
29 F.3d 1495 (11th Cir. 1995) 26, 27, 28

SDJ, Inc. v. City of Houston,
837 F.2d 1268 (5th Cir. 1988) 6, 7, 17

Schultz v. City of Cumberland,
228 F.3d 831 (7th Cir. 2000) 8

Smith v. California,
361 U.S. 147 (1959) 19

TK's Video, Inc. v. Denton County,
24 F.3d 705 (5th Cir. 1994) 12

Universal Amusement Co., Inc. v. Hofheinz,
616 F.2d 202 (5th Cir. 1980) 5

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

United States Constitution:

First Amendment ..... *passim*

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 10

RULES

Supreme Court Rule 12.6 iii

Supreme Court Rule 14.1(b) ii

ORDINANCES

Houston Ordinance No. 97-75 ..... *passim*

Houston Ordinance No. 86-323 ..... 2, 6

Houston Code of Ordinances:

§ 28-125(b)(1) 8

§ 28-125(b)(3) 9

§ 28-253(a) 26

§ 28-254(c) 26, 29

§ 28-254(f) 26

PETITION FOR A WRIT OF CERTIORARI

Petitioners Ice Embassy, Inc., *et al.*, hereby pray that the Court issue a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit, upholding a 1997 Houston, Texas adult business ordinance. The ordinance contains expanded locational restrictions which, according to Houston's own pre-enactment study, will force the closure of 103 of the 119 existing adult entertainment businesses. The new ordinance expands prior locational restrictions enacted in 1986 which likewise are believed to have eradicated most of the *then*-existing adult businesses. In upholding the 1997 ordinance's locational and work permit provisions, the decision below conflicts with decisions of the Seventh, Ninth, and Eleventh Circuits, and with decisions of this Court announcing essential First Amendment principles.

RELEVANT OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003), and is reproduced as Appendix A to this Petition. (App. 1-62.) The United States District Court for the Southern District of Texas issued numerous orders and opinions, including three primary opinions which were jointly reported as *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1998), consisting of its Memorandum Opinion and Order of February 18, 1998, as amended June 9, 1998 (reproduced as Appendix B; App. 63-299), its Opinion Supplementing Decision on Reconsideration of June 11, 1998 (reproduced as Appendix C; App. 300-431), and its Additional Supplemental Opinion of August 7, 1998 (reproduced as Appendix D; App. 432-444). The order of the court of appeals partially granting and then denying rehearing and rehearing en banc is reported as *N.W. Enterprises, Inc. v. City of Houston*,

372 F.3d 333 (5th Cir. 2004), and is reproduced as Appendix E to this Petition. (App. 445-454.)

The district court issued an Order of Severance on August 28, 1998 (App. 508), and its Final Judgment on August 31, 1998 (App. 509), reproduced in Appendices H and I, respectively.

JURISDICTION

The court of appeals' judgment was entered on November 25, 2003. A timely petition for rehearing and rehearing en banc was partially granted and then denied on May 28, 2004 (App. 445-454). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Houston Ordinance 97-75 is 65 pages in length, and all potentially relevant portions are reproduced in Appendix F (App. 455-490).

Houston Ordinance 86-323 is 33 pages in length, and all potentially relevant portions are reproduced in Appendix G (App. 491-507).

STATEMENT OF THE CASE

This case raises three First Amendment questions of great practical and doctrinal importance, two of which are related to so-called "adult zoning" laws. The first is whether a city may, through a pattern of successive adult zoning laws, *repeatedly* change the permissible locations for adult businesses, and, each time, apply the new law to

eliminate the majority of pre-existing adult businesses. This question asks the Court to consider whether such a municipal "shell game" has too great a deterrent impact on expression to provide the "reasonable opportunity" to open and operate an adult business promised by *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986).

Alternatively, the question arises whether such a provision can be upheld (in its application to pre-existing businesses) absent review under a more heightened standard than the deferential time, place and manner test suggested for initial adult zoning laws in *Renton*. While Petitioners do not challenge the application of such a law to *new* adult businesses, they ask this Court to consider whether strict scrutiny should apply when a city repeatedly changes the permissible locations, repeatedly terminates all resultant non-conforming adult uses, and repeatedly uses such a scheme to eliminate many, if not the overwhelming majority, of then-existing adult uses.

The second pivotal First Amendment question is whether a city may expand the substantial existing separations required between adult businesses and "sensitive" uses without evidence of any *need* for those expansions, and where such expansions will eliminate the majority of adult businesses. This question asks the Court to evaluate the significance of its landmark split decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) – and particularly the "proportionality" requirement expressed in Justice Kennedy's concurring opinion – for analyzing content-*based*[1] time, place, or manner restrictions on expression. Justice Kennedy's

---

[1] In *Alameda Books*, five Justices agreed that restrictions primarily aimed at adult entertainment businesses are properly considered as content-*based*, rather than content-*neutral*. Petitioners will employ that convention throughout this petition.

proportionality test determines the constitutionality of such restrictions by comparing their value in combatting secondary effects to their burden on expression. Under that test, Petitioners clearly should have prevailed.

The locational restrictions of Houston Ordinance No. 97-75 ("the Ordinance") on their face may arguably further a governmental purpose in combatting secondary effects sufficient to satisfy the *Alameda plurality's* understanding of *Renton*. However, the expanded restrictions fail the proportionality test Justice Kennedy articulated in his *Alameda Books* concurrence, because they serve no purpose not already equally well served by the prior locational provisions they replaced, i.e., they will not *reduce* any secondary effects that may exist.

In upholding nearly all of the restrictive adult business regulations in the Ordinance, the court of appeals below held that *Alameda Books* essentially changed *nothing* in First Amendment doctrine, notwithstanding that, following *Alameda*, there is apparently no longer a majority of this Court with a unified understanding of the proper analytical framework to apply to content-based time, place and manner restrictions. Petitioners ask the Court to clarify the "proportionality" requirement of *Alameda Books* and its role in the analysis of a content-based time, place, or manner regulation like Houston's most recent expansion of its adult business locational restrictions.

Finally, this petition also raises a significant First Amendment issue in connection with the required procedural safeguards when a municipality requires all adult business entertainers and managers to obtain individual permits before being allowed to work.[2] Although many

[2] The challenged Ordinance states that both the unpermitted workers, *and* any business employing such persons, violate the

(Continued on following page)

cities issue temporary permits to such persons concurrent with filing their permit applications, Houston requires them to wait up to 10 days for a ruling on their applications. If the City fails to meet this ordinance-mandated deadline for ruling on their applications, it does not even *then* allow them to start working immediately, even temporarily. Rather, they must return to the police department and fill out *another* application, this time for a temporary permit. If City officials delay or defer *its* issuance, the ordinance does not allow them to work even then on proof that they applied for that temporary permit. Petitioners ask this Court to address whether such a scheme constitutes an impermissible prior restraint of First Amendment rights.

Historical Background

Since 1977, Houston has enacted a succession of ordinances imposing restrictions on permissible locations for adult entertainment businesses[3] and also imposing numerous

---

ordinance where an unpermitted person is allowed to work. Consequently, both the employee-Petitioners *and* owner-Petitioners challenge these provisions.

[3] The City enacted ordinances imposing adult business *locational* restrictions in 1977 (found unconstitutional in *Universal Amusement Co., Inc. v. Hofheinz*, 616 F.2d 202 (5th Cir. 1980)), 1983 (imposed only on adult modeling studios, encounter parlors, and live entertainment businesses not serving alcohol), 1986 (adding topless bars to list of regulated uses), 1991 (adding adult bookstores and adult movie theaters to list of regulated uses), and 1997 (adding no *new* regulated uses, but further reducing permissible locations for all already-regulated uses).

Substantively, the locational restrictions in the 1983 ordinance prohibited the regulated adult businesses from locating near each other, or near churches and schools, and introduced a prohibition against operating in areas with a defined concentration of tracts which "are residential in character." The 1986 ordinance additionally prohibited all regulated adult uses from locating near day care centers. The

(Continued on following page)

operating and licensing restrictions on such businesses. Apart from the current 1997 ordinance challenged herein (Ord. 97-75), the most relevant prior ordinance is the 1986 adult business ordinance (Ord. 86-323) which was upheld in *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988).

The 1986 Ordinance, for the first time, applied locational[4] restrictions to topless clubs,[5] along with dozens of other unique requirements. Those locational restrictions – which applied not only to new, but also to already existing, adult businesses – forced the closure of the 23 topless club plaintiffs in the *SDJ* case[6] constituting what Petitioners believe to have been the overwhelming majority of such businesses then existing in Houston.[7] Existing businesses rendered non-conforming were allowed only about 8½ months in which to comply before being forced to close. (App. 506.)

1991 ordinance did not add any new separation criteria. The 1997 ordinance expanded all the required separation distances, and additionally prohibited operating near public parks; it also made more restrictive the existing residential proximity restriction.

[4] The term "locational" is used rather than "zoning," as Houston does not regulate land uses by a comprehensive zoning ordinance. Hence, the *only* municipal locational restrictions in Houston appear to be those which apply to adult businesses.

[5] This inclusion of topless clubs as a regulated use was the result of a change in Texas law in 1985 which, for the first time, allowed municipalities to regulate such alcohol-serving establishments. *See* 837 F.2d at 1272.

[6] *See* 837 F.2d at 1271.

[7] In discovery, Petitioners asked the City for the number of each type of adult entertainment business in existence at the time of enactment of the 1986 Ordinance, as well as the number of such businesses forced to close by that ordinance. The City refused to provide this information, and the district court denied Petitioners' motions to compel such disclosure. On appeal, Petitioners asserted, unsuccessfully, that it was error to deny these discovery motions.

After the federal courts upheld the 1986 Ordinance in the *SDJ* litigation, the numerous *SDJ* plaintiffs' businesses were forced to close, as likely were others not part of that case.[8] Nonetheless, after the 1986 Ordinance was upheld in *SDJ*, new entrepreneurs, as well as some displaced prior owners, reasonably assumed that the permissible locations for such businesses had finally been determined and, in reliance, established new adult businesses at the locations allowed under the judicially-upheld restrictions of the 1986 Ordinance.[9]

Petitioners herein consist of the owners of two of the largest adult clubs in Houston, many of their entertainers and managers, and the landlord of one of those businesses.[10] The presidents of both owner-Petitioners submitted declarations indicating that they had invested millions of dollars in establishing their businesses (one estimated at $9,486,742, another estimated at $13,515,814). They attested that they both established their current locations only *after* the *SDJ* ruling upholding the 1986 ordinance, and that they would not have established those businesses if they had thought that they could not rely on the 1986 Ordinance's locational restrictions. They also declared that if the current 1997 Ordinance were ultimately upheld in its

---

[8] Petitioners assume that other businesses were also forced to close. Again, Petitioners do not have this information only because their discovery requests for such information were denied.

[9] Petitioner Texas Richmond, for example, had operated one of the topless clubs that had been forced out by the 1986 Ordinance. Its president declared that it had relocated within Houston only because it had concluded that the litigation was over and its lawful relocation would assure it a site in permanent compliance with all municipal locational restrictions.

[10] Because these businesses serve alcohol, under Texas law, the dancers appear in various degrees of clothing, ultimately becoming topless, but never fully nude.

application to pre-existing businesses, they would never again attempt to relocate in Houston, as the principle would then have been established that the City may repeatedly close them at will, without any new showing of need.

Not content with the 1986 Ordinance, the City decided *again* to change its locational restrictions for all "adult businesses."[11] In connection with that decision, in 1996, the City determined that there were then 119 adult entertainment businesses in Houston, and that, under the contemplated new locational restrictions, 103 would be rendered non-conforming. Nonetheless, in 1997, the City proceeded to enact these restrictions by adopting Ordinance 97-75, the subject of this Petition.

Pursuant to the locational restrictions of the prior 1986 Ordinance, adult businesses such as Petitioners' were prohibited from locating or continuing to exist, *inter alia*, within 750 feet of specified sensitive uses (e.g., schools, churches and day care centers), and were prohibited if situated such that, within a 1,000 foot radius, 75% or more of the "tracts" were "residential in character."

Under the 1997 Ordinance, the City expanded these separation requirements to prohibit adult businesses within *1,500* feet of any sensitive uses (*see* H.C.O. § 28-125(b)(1); App. 470), and if situated within a *1,500* foot radius where 75% or more of the tracts are "residential in character." (*See*

---

[11] Under the City's 1983 Ordinance, adult businesses were generically referred to as "Sexually Oriented Commercial Enterprises." In the 1986 ordinance, adult entertainment businesses were disparagingly referred to, instead, as "sex oriented businesses." This was no doubt done so they could be described by the acronym "SOB," a proclamation of overt hostility not unique to Houston. *See, e.g., Schultz v. City of Cumberland*, 228 F.3d 831, 835 (7th Cir. 2000). For these reasons, Petitioners shall, instead, refer to the regulated businesses under the neutral term of "adult businesses."

H.C.O. § 28-125(b)(3); App. 471.) There was no evidence in the legislative record of any need for these expanded separation requirements, i.e., no evidence of any secondary effects occurring more than 750 feet away from *any* of these businesses. However, there was ample evidence that the Ordinance's new locational restrictions would eliminate the overwhelming majority of then-existing adult businesses.

The 1997 Ordinance also modified the locational restrictions in other ways, one of which was to redefine a portion of the formula for computing residential proximity where a neighboring use is a "multi-family dwelling." If enforceable, that redefined formula would likely eliminate one Petitioner's business, even if the ordinance's expanded separation requirements for churches, schools and day care centers were stricken.[12]

The 1997 Ordinance also enacted a variety of new *operational* and *licensing* restrictions, including many specifically targeting adult live entertainment businesses. These included a new business permit requirement, permit requirements for any entertainers and managers, numerous operational restrictions, and signage and aesthetic restrictions.

Shortly after enactment of the 1997 Ordinance, Petitioners and various separately represented adult businesses and their entertainers and managers brought

---

[12] Whether the club in question will necessarily be eliminated by the combination of the new "multi-family dwelling" provision and expanded residential proximity provision and, if so, whether these provisions are unconstitutional as so applied, are issues not yet resolved in the trial court nor presented here for review, but resolution of these constitutional issues on remand would be unnecessary if this Court were to agree with Petitioners that successive changes in adult zoning legislation are unconstitutional to the extent they *repeatedly* eliminate all uses which they render non-conforming.

the present action in the Southern District of Texas pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief against enforcement of the 1997 Ordinance.[13] Although *dozens* of constitutional challenges were collectively brought to various portions of the Ordinance, only the following challenges are germane for purposes of this petition.

First, Petitioners[14] asserted that all of the 1997 Ordinance's provisions which further reduced the permissible locations for adult businesses were unconstitutional *to the extent they applied to preexisting businesses such as Petitioners'*.[15] Petitioners argued that this type of "shell game" pattern of locational restrictions creates a unique chilling effect on expression which effectively denies them any "reasonable opportunity" to open and operate such businesses, as guaranteed by this Court in *City of Renton, supra*.

Second, Petitioners argued that the Ordinance's expansion of the required separation between adult businesses and churches, schools and day care centers from 750 feet to 1500 feet was independently unconstitutional because the amendments would have a devastating impact on existing businesses, with no showing that any secondary effects attributable to adult businesses were occurring more than 750 feet away from their premises.

---

[13] Petitioners' best determination is that there were 12 separately represented groups of district court plaintiffs, consisting of 203 parties who were either plaintiffs or intervening plaintiffs.

[14] Each of the challenges hereafter described was distinctly raised by *these* Petitioners; other plaintiffs joined in many of these challenges.

[15] Petitioners' two businesses are non-conforming under the expanded separation requirements involving churches and day care centers, and one such business appears to have been rendered non-conforming by the amended provisions regarding residential proximity.

Third, Petitioners challenged the City's new permit requirement for adult business entertainers and managers as a facially unconstitutional prior restraint, in violation of this Court's line of cases commencing with *Freedman v. Maryland*, 380 U.S. 51 (1965), because, *inter alia*, the permit requirement failed to allow such individuals to commence working immediately (even if only temporarily) after the City violated its own time limits for ruling on their permit applications.

In a succession of rulings, the district court addressed these claims. First, with respect to Petitioners' claim that the City may not repeatedly change its zoning laws and repeatedly apply such amendments to terminate pre-existing businesses which had located in reliance on earlier amendments, the court rejected that argument giving two reasons: (1) the belief that such a scheme was allowed by *Renton*; and (2) the lack of any case presenting the same circumstances where a court had so ruled. *See* App. 353-354 (27 F.Supp.2d at 882). (The district court cited no other basis for its ruling, nor any case rejecting Petitioners' argument.) The district court did not specifically discuss Petitioners' claim that this type of "shell game" approach to zoning denies adult businesses the "reasonable opportunity" to open and operate guaranteed by *Renton*.

Second, the district court ruled *in favor* of Petitioners with respect to their challenge that the portion of the ordinance expanding the separation requirements between adult businesses and churches, schools and day care centers was unconstitutional due to an inadequate showing of need for the expanded restrictions. *See* App. 150-182 (27 F.Supp.2d at 800-814). The court found *no* evidence of any secondary effects occurring more than 750 feet away from adult businesses.

Third, the district court rejected Petitioners' facial constitutional challenge to the entertainer and manager permit requirements as impermissible prior restraints, under the perceived binding authority of *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994). *See* App. 259-263 (27 F.Supp.2d at 844-846). The district court reasoned that *TK's Video* allowed a city a full 60 days to grant or deny any employee permit application and, accordingly, any delays associated with Houston's ten-day processing period were not likely to exceed the 60-day period presumably authorized by *TK's Video*. *Id.*

These and other rulings on summary judgment resolved most of the issues in the case. However, the district court severed and administratively closed a few issues, to be revisited only if the ultimate appellate resolution of the facial challenges left anything to be decided. (App. 508.) It then issued a final judgment resolving all *other* parts of the case (App. 509), allowing the parties to later litigate the severed issues, if necessary, on any subsequent remand.

The district court ultimately decided several *dozen* constitutional challenges to this comprehensive ordinance. All told, its rulings were split fairly evenly between the plaintiffs and the defendants. The City appealed, and Petitioners and most of the other plaintiffs below filed cross-appeals.

The court of appeals, per Judge Edith Jones, upheld nearly every aspect of the Ordinance. With respect to Petitioners' "shell game" argument, the court of appeals stated:

> "Appellees argue that it is unconstitutional for a city to change the rules repeatedly with retroactive impact, and to affect drastically the overwhelming majority of existing adult businesses each time." App. 19 (352 F.3d at 177).

The court of appeals rejected this argument for three reasons, including two utilized by the district court. First, it said that the Petitioners had cited no prior case favorable to them on this issue. Like the district court, the court of appeals cited no case *adverse* to Petitioners, but rejected their argument essentially because the issue is one of first impression. *Id.* The court did not specifically discuss Petitioners' claim that this "shell game" approach to zoning denies adult businesses the "reasonable opportunity" to open and operate guaranteed by *Renton*.

As a second basis for rejecting Petitioners' shell game argument, the court of appeals stated: "The SOBs have not attempted factually to support their contention that the City's course of amendments has successively put SOBs out of business." However, the court of appeals apparently misread the record, which clearly established that both the 1986 and 1997 Ordinances "successively put SOBs out of business." *Id.* Finally, the court held that Petitioners' argument also failed because it assertedly conflicted "with the authority expressly reserved to cities in *City of Renton* [*v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)], and reaffirmed in [*City of Los Angeles v.*] *Alameda Books, Inc.*, [535 U.S. 425 (2002)], to experiment with different possible solutions to municipal problems." *Id.*

The court of appeals reversed the district court's separate ruling striking the expansion of the separation requirements from churches, schools and day care centers. It rejected the district court's two-part rationale that the new distances violated the First Amendment because: (1) there was no showing of any *need* for the expansion; and (2) the majority of adult businesses would be closed if the expansion were upheld.

The court of appeals concluded that this Court's decision in *Alameda Books* allowed a highly deferential standard of review requiring no showing of *need* to expand the locational restrictions:

> "The standard of constitutional scrutiny, after *Alameda Books, and taking into account Justice Kennedy's concurrence*, is simply whether Ordinance 97-75 addressed secondary effects of adult speech as demonstrated by the legislative record submitted by the City. Even before *Alameda Books*, however, neither the Supreme Court nor this court *required proof of the efficacy of an ordinance* in order to determine the constitutional review standard." App. 13 (352 F.3d at 174) (emphasis added).

By concluding that "efficacy" was irrelevant, the court of appeals essentially concluded that it is constitutionally irrelevant whether there is any significant *need* for an expansion of separation requirements that is not already fully met by pre-existing restrictions.[16]

The court of appeals also rejected Petitioners' challenge to the City's entertainer and manager permit requirements, including their argument that these requirements were invalid because entertainers and managers were not permitted to work, even temporarily, if the City failed to observe its own time limits in ruling on their permit applications:

---

[16] The court of appeals specifically faulted the district court's conclusion that "it should ascertain 'whether the City Council relied on evidence in the legislative record from which it could have determined that negative secondary effects associated with adult businesses actually exist and that the proposed regulations would in some way address these effects.'" App. 13 (352 F.3d at 174).

> "Section 28-254(f) of the Ordinance provides that if the City does not issue or deny a [manager or dancer] permit within the 10-day processing period, it must immediately issue a temporary permit upon written request by the applicant. FTU argues that the permit requirements are unconstitutional prior restraints on expression because requiring an applicant to submit a written request for a temporary permit is not the least restrictive method for dealing with an untimely response by the City." App. 52 (352 F.3d at 193).

In a footnote, the court acknowledged two less restrictive alternatives that Petitioners had suggested:

> "First, the City could allow applicants whose permits have not been issued by the end of the tenth day to immediately begin work on the eleventh day without submitting a request in writing. Alternatively, the City could issue temporary permits when applicants turn in their permit applications so that applicants can work while they wait for their applications to be processed." App. 52, n.36 (352 F.3d at 193, n.36).

The court of appeals rejected Petitioners' claim that this scheme constituted an impermissible prior restraint, holding that "this circuit does not require that the least restrictive means be implemented" even when analyzing prior restraints. App. 52 (352 F.3d at 193).

REASONS FOR GRANTING THE WRIT

1. In rejecting Petitioners' challenge to Houston's "shell game" pattern of repeatedly changing the permissible locations for adult businesses and, each time, terminating all businesses thereby rendered nonconforming, the court of appeals has rendered a decision in conflict with the "reasonable opportunity" requirement recognized by this Court in *City of Renton*, and such ruling raises an important question of federal law that should be settled by this Court in any event regarding the standard of review for analyzing such ordinances.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court applied time, place and manner analysis in assessing the constitutionality of an "adult zoning" ordinance which applied exclusively to new adult businesses and did not require the termination of any non-conforming pre-existing uses.

This Court has not addressed the question of whether the First Amendment tolerates adult zoning ordinances which include mandatory termination provisions for pre-existing businesses. However, the lower federal courts have routinely cited *Renton* in upholding such provisions under circumstances where a city, for the first time, imposes substantial zoning or locational restrictions on adult businesses and requires termination of previously conforming adult uses. Petitioners do not challenge those precedents here.

The present case presents a very different circumstance, and a matter of first impression with the gravest First Amendment implications: whether a city may adopt adult zoning restrictions that eliminate many – if not the overwhelming majority – of pre-existing businesses and then revise its adult zoning restrictions *again* to terminate the

overwhelming majority of adult businesses which located in reliance on the initial restrictions.

In its own 1996 pre-enactment study, Houston concluded that its contemplated expanded locational restrictions would terminate approximately 103 of the then-existing 119 adult entertainment businesses. App. 178 (27 F.Supp.2d at 812). The district court found this assessment "relatively accurate." App. 179, n.120 (27 F.Supp.2d at 812, n.120).

This issue requires the Court's review because the chilling effect of a *second* adult zoning ordinance applicable to pre-existing businesses is *far* greater than that of an initial one. The two owner-Petitioners herein, as well as other owners below, submitted declarations stating that they established their current businesses only *after* (and in reliance on) the enactment of the 1986 locational restrictions. They stated that the City's *initial* 1986 locational restrictions on their type of adult business did not deter them from establishing their current businesses because they had assumed that they could rely on the locations allowed by the 1986 Ordinance, and approved in *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988). However, these declarants further stated that if the *current* zoning amendments were upheld in their application to pre-existing uses, they would not again attempt to locate in Houston because there would then be no effective barrier to prevent the City from repeatedly playing this "shell game." Given the enormity of their investment, they could not prudently relocate for what might turn out to be only a short period of time, the duration of which would be totally within the unfettered discretion of the City.

The declarants also stated that if these successive locational restrictions were upheld, no reasonably prudent business person in a municipality historically hostile to adult businesses would make a substantial investment to relocate or open a multi-million dollar business such as theirs. This

evidence was uncontroverted, and highly significant given *Renton*'s holding that adult zoning ordinances must at least provide a "reasonable opportunity" to open and operate an adult business. 475 U.S. at 54. If prudent business owners would not consider potentially relocating in Houston because of the City's sequential changes in permissible locations, such a scheme would appear to conflict with *Renton*'s "reasonable opportunity" requirement.[17] Consequently, since the court of appeals' opinion endorses this successive approach to adult zoning legislation, it exacerbates this chilling effect and is sharply in conflict with *Renton*.

Apart from whether application of a second such ordinance to pre-existing uses is flatly barred by *Renton*'s "reasonable opportunity" requirement, this case alternatively presents the critical issue of whether the validity of such a scheme should at least be analyzed under a test of strict judicial scrutiny rather than deferential time, place and manner analysis. The court of appeals applied the latter standard, concluding that any new zoning amendment could be upheld on a showing merely that it allowed as many potential relocation sites as the number of displaced businesses. App. 29, n.20 (352 F.3d at 182, n.20).

---

[17] Recognition of this same type of concern underlies the rationale for at least two Eleventh Circuit opinions involving adult business *licensing* ordinances, *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1363 (11th Cir. 1999), and *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1313-1314 (11th Cir. 2003). These cases held that ordinances providing no deadlines for municipal action on adult business license applications, but which attempt to remedy that defect by allowing such businesses to open pursuant to mere *temporary* permits, do not satisfy First Amendment requirements. Those decisions recognize that few persons would invest in and open a capital-intensive business on the basis of only a temporary permit, the duration of which is left within the total discretion of hostile municipal officials, as is the decision whether the permit should be granted at all.

However, as Petitioners now realize, the availability of such sites, no matter how numerous, is entirely meaningless if a city has the unfettered power to modify its zoning restrictions repeatedly and each successive time terminate all uses thereby rendered non-conforming. This is particularly so in Houston where such changes will eliminate many, if not the overwhelming majority, of adult businesses.

In short, the key difference between this case and every other adult zoning case to have come to this Court since *Renton*, is that if this judgment is upheld, very few, if any, adult businesses terminated by a locational ordinance will relocate to alternative sites. Moreover, if the Fifth Circuit's decision is upheld, those municipalities throughout the nation hostile to adult businesses will emulate this tactic in order to eliminate adult businesses, and permanently deter them from re-establishing. Again, all this would be justified under the asserted imprimatur of *Renton*, a case which never considered the unique threats to expression posed by a "shell game" scheme involving successive adult zoning restrictions.

Finally, review is warranted because the decision below is in conflict with this Court's chilling effect doctrine. Ignoring Petitioners' repeated chilling effect arguments, the court of appeals failed to recognize that the First Amendment is not blind to regulations or practices which severely chill the exercise of protected expression. *See, e.g., Smith v. California*, 361 U.S. 147 (1959), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

2. The court of appeals has entered a decision in conflict with this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and with the decisions of the Seventh, Ninth and Eleventh circuits regarding the proper interpretation and scope of the "proportionality analysis" applicable to content based "adult zoning" restrictions, as articulated in Justice Kennedy's controlling concurring opinion in that case.

A. Conflict with *Alameda Books*.

The court of appeals' upholding of Houston's 1997 adult zoning amendments presents an entirely distinct, but no less critical, issue for this Court's review. Specifically, the district court, presaging Justice Kennedy's concurring opinion for a divided Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002),[18] found that the 1997 locational changes were facially unconstitutional because they would have a drastic adverse impact on the majority of expressive adult businesses in Houston without any corresponding showing of *need* for the changes. The district court emphatically concluded that the 1997 changes (which expanded the adult business separation requirements from churches, schools and day care centers from 750 feet to 1500 feet, and the separation requirements from residentially designated areas from 1000 feet to 1500 feet), were entirely unnecessary, because there was *no* evidence of *any* adult business secondary effects occurring more than 750

[18] Under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), Justice Kennedy's concurring opinion in *Alameda Books* presumably constitutes the holding of the Court in that case, as it was the narrowest opinion concurring in the judgment.

feet away from any adult businesses, nor evidence that the existing locational restrictions were ineffective.

The district court's balancing of the need for new restrictions against their likely impact on expression was precisely the "proportionality analysis" that Justice Kennedy employed in his concurring opinion in *Alameda Books*. In assessing an aspect of Los Angeles' adult zoning ordinance, Justice Kennedy stated that "a city must advance some basis to show that its regulation has the purpose *and effect* of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." 535 U.S. at 449 (emphasis added). Justice Kennedy reiterated that the "claim" supporting adult zoning restrictions "must be that . . . the quantity of speech will be substantially undiminished, and that total secondary effects will be *significantly reduced*. This must be the rationale of a dispersal statute." 535 U.S. at 451 (emphasis added).

The district court concluded that total secondary effects would *not* be "significantly reduced" because there was no evidence of any secondary effects occurring more than 750 feet away from adult businesses. Moreover, the court found that the *quantity of speech would be substantially diminished*, because the vast majority of existing businesses would be forced to close. Thus, the court conducted the precise proportionality analysis which Justice Kennedy articulated.

On appeal, the court of appeals entirely ignored this critical aspect of Justice Kennedy's concurring opinion, concluding that the sole test for analyzing this type of ordinance "after *Alameda Books*, and *taking into account Justice Kennedy's concurrence*, is simply whether Ordinance 97-75 addressed secondary effects of adult speech, as demonstrated by the legislative record submitted by the city. . . . [N]either the Supreme Court nor this court *require . . . proof of the efficacy of an ordinance* in order to

determine the constitutional review standard." (Emphasis added.) App. 13 (352 F.3d at 174).

To the contrary, Justice Kennedy emphatically stated that proof of the efficacy of this type of ordinance was required to establish its constitutionality. Specifically, he stated that the claim must include proof "that total secondary effects will be *significantly reduced*." (Emphasis added.) 535 U.S. at 451. Consequently, the court of appeals' opinion is in sharp conflict with Justice Kennedy's concurring opinion in *Alameda Books*.

B. Conflict with opinions in the Seventh, Ninth and Eleventh Circuits.

The court of appeals' opinion is also in conflict with at least three other circuits' opinions interpreting the significance of Justice Kennedy's *Alameda Books* concurrence. These divergent approaches have created a pressing need for this Court to clarify the significance of Justice Kennedy's "proportionality" requirement in *Alameda Books*, because the circuit courts of appeals are badly split in interpreting and applying that requirement.

For example, the Ninth Circuit, in *Center For Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003), concluded that Justice Kennedy's concurring opinion *does* constitute the "controlling opinion" in *Alameda*. The Ninth Circuit further concluded that his proportionality requirement applied to content-based adult zoning restrictions, but not to content-based restrictions on the *time* or *manner* of expression. 336 F.3d at 1163. The court stated:

> "Justice Kennedy's proportionality analysis . . . needs to be understood in light of the particular species of secondary effects law that the Court was considering. The ordinance at issue in *Alameda Books* was a classic erogenous zoning

> ordinance whereby the city was restricting certain land uses. It was a 'place' restriction, and Justice Kennedy's proportionality analysis is easy enough to understand and to apply to such a typical zoning ordinance. *The city's rationale cannot be that when it requires businesses to disperse (or to concentrate), it will force the closure of a number of those businesses, thereby reducing the quantity of protected speech.*" *Id.* (emphasis added).

In contrast, the court of appeals herein found it irrelevant that Houston's adult zoning ordinance will "force the closure of a number of those businesses [indeed, an overwhelming *majority*], thereby reducing the quantity of protected speech." *Id.* Consequently, the Fifth and Ninth Circuits fundamentally disagree over the applicability of Justice Kennedy's "proportionality analysis" in the context of an adult zoning case.

The opinion below also sharply conflicts with the position of the Seventh Circuit, which, in *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 637 (7th Cir. 2003), went even further than the Ninth Circuit by recognizing that Justice Kennedy's proportionality requirement is now the appropriate standard by which to measure the validity of *all* content-based[19] "time, place or manner" restrictions.[20] *G.M. Enterprises* acknowledged the controlling nature of Justice Kennedy's proportionality requirement and reiterated that under that test, "'the rationale of the ordinance must be that it will suppress secondary effects – and not by suppressing speech.'" *Id.* at 638, quoting from 535 U.S. at 450.

---

[19] *See* n.1, *supra*.

[20] *G.M. Enterprises* applied Justice Kennedy's proportionality analysis to a restriction on the "manner" of operation of adult businesses.

The *G.M. Enterprises* court likewise relied on Justice Kennedy's concurrence in concluding that a municipality must demonstrate "how speech will fare under the city's ordinance." 350 F.3d at 638. The Fifth Circuit employed no such analysis.

Likewise, the opinion below conflicts with the Seventh Circuit's opinion in *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004), which addressed the constitutionality of another adult zoning ordinance and concluded that it was bound to apply Justice Kennedy's "proportionality principle," i.e., that the city's "premise in support of the Ordinance must be that . . . [it] will significantly reduce negative secondary effects that occur when there is a concentration of adult uses in an area without substantially diminishing the availability of speech." *Id.* at 410.

The opinion below also conflicts with the Eleventh Circuit's observation in *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251, 1267, n.15 (11th Cir. 2003), that under Justice Kennedy's concurring opinion in *Alameda*, "the County 'must advance some basis to show that its regulation has the . . . effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.'" 337 F.3d at 1267, n.15 (quoting from Justice Kennedy's concurrence at 545 U.S. at 449).

Indeed, the Fifth Circuit's opinion below was its *second* consideration of the significance of Justice Kennedy's concurrence. In *Encore Videos, Inc. v. City of San Antonio (Encore I)*, 310 F.3d 812 (5th Cir. 2002), that court struck down a San Antonio adult zoning ordinance based on yet another distinct interpretation and application of Justice Kennedy's concurring opinion in *Alameda*. There, the Fifth Circuit specifically analyzed the ordinance under Justice Kennedy's concurring opinion and concluded that Justice Kennedy's vote, combined with the votes of the four dissenters in *Alameda*, constituted a holding based on

an aspect of the *Alameda* opinion articulated in Justice Souter's *dissenting* opinion. However, on reconsideration, the Fifth Circuit issued an amended opinion, *Encore Videos, Inc. v. City of San Antonio (Encore II)*, 330 F.3d 288 (5th Cir. 2003), in which it struck the ordinance under a traditional "narrow tailoring" test, deleting any mention of Justice Kennedy's concurring opinion or its significance in evaluating this type of ordinance.

Based on the foregoing, it is clear that the courts of appeals require guidance from this Court concerning: (1) whether all aspects of Justice Kennedy's concurring opinion constitute the holding of this Court in *Alameda Books*; and (2) whether that opinion establishes a constitutional test of broader dimension, which is more speech-protective, than that of the plurality in *Alameda*.

Moreover, given that the district court applied *precisely* the mode of analysis employed by Justice Kennedy in *Alameda*, but was reversed for doing so, this case affords an ideal opportunity for decisively resolving these issues.

3. The court of appeals has entered a decision in conflict with decisions of the Eleventh Circuit regarding procedural deficiencies in permit requirements for adult business workers.

One other issue is of sufficient national importance to merit this Court's review. The court of appeals upheld a permit scheme for adult entertainment business workers that does not allow applicants to commence working (even temporarily) after licensing officials fail to render timely rulings on their permit applications. This decision is in sharp conflict with at least two decisions of the Eleventh Circuit Court of Appeals holding that licensing requirements for adult businesses must guarantee an immediate right to operate, at *least* temporarily, if licensing officials

fail to comply with ordinance-imposed deadlines for the timely issuance or denial of permits.[21]

Houston requires a permit for all adult business managers and entertainers (*see* H.C.O. § 28-253(a), App. 478), and, unlike many cities, does *not* allow such applicants to work while their applications are being processed. Rather, Houston allows its officials ten days to rule on such applications,[22] although they *must* rule within that period. H.C.O. § 28-254(c) (App. 479-480.) However, if municipal officials violate § 28-254(c) and do not rule within the 10 days, the applicant may not automatically then begin to work (not even temporarily pending a ruling), but, instead, must return to the Police Department and fill out a *second* application – this time for a *temporary* permit.

The ordinance (per H.C.O. § 28-254(f); App. 480) provides for the immediate issuance of a temporary permit to any applicant who applies for it following the City's failure to rule within the initial 10-day period. However, that apparent safeguard is meaningless because the applicant may not immediately commence working until the City actually *issues* the temporary permit, and if licensing officials once again fail to comply with the ordinance's requirements, the applicant is left without an adequate remedy.

---

[21] *See, e.g., Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1995), *cert. denied*, 514 U.S. 1066 (1995), and *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306 (11th Cir. 2000).

[22] In contrast, the Ninth Circuit Court of Appeals, in *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1060 (9th Cir. 1986), struck down a *five*-day waiting period for applicants for erotic dancer licenses on the ground that the County had failed to provide adequate justification for so long a waiting period. While Petitioners raised this precise type of challenge below in both courts, they do not raise this specific issue in this Court, but instead focus on the ordinance's failure to allow applicants to work immediately after authorities fail to act on permits within their legislatively prescribed time limits.

The Eleventh Circuit has interpreted the First Amendment's requirements quite differently. In *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1995), the court considered an ordinance requiring the licensing of adult entertainment businesses. The ordinance mandated a ruling on a license application within 45 days, but failed to "create an absolute right to operate at the expiration of forty-five days."[23] *Id.* at 1501. The defect was that "the forty-five-day time limit is illusory, in that the Administrator's failure to comply with the time limit does not necessarily allow the applicant to begin engaging in the expressive activity for which the license is sought." *Id.* at 1500. Therefore, the court held, "[o]n its face . . . [the ordinance] risks the suppression of protected expression for an indefinite time period prior to any action on the part of the decisionmaker or any judicial determination." *Id.* at 1501.

Similarly, in *Artistic Entertainment v. City of Warner Robins*, 223 F.3d 1306, 1310-1311 (11th Cir. 2000), the court invalidated an ordinance similar to that in *Redner*, which imposed time limits for adult business licensing rulings, but failed to allow the applying businesses to commence operating immediately if the city "because of bad faith or innocent bureaucratic delays, fails to act on an application before the deadline."[24]

---

[23] Interestingly, the *Redner* ordinance *did* state that the applicant "*may* be permitted to begin operating the establishment while a license is sought," 29 F.3d at 1500-1501. However, it did not provide that the applicant "*must*" be permitted to begin operating the establishment pending licensure. Consequently, the court found that this provision could not guarantee an applicant protection under circumstances where a City fails to comply with its own time limits.

[24] Later Eleventh Circuit cases have suggested that adult licensing ordinances which impose *no* specific time limits for municipal action (unlike the ordinances in *Redner*, *Warner Robins*, and the present case), but which attempt to finesse that requirement by allowing all such

(Continued on following page)

As *Redner* and *Warner Robins* make clear, procedural safeguards (such as time limits) in a speech-licensing ordinance are inadequate unless the ordinance provides a meaningful First Amendment remedy for *violation* of those procedural safeguards. For adult business workers, the best remedy would be to have the work permit "deemed issued" immediately if licensing officials ignore the ordinance-prescribed deadlines. However, even the lesser remedy of a *temporary* right to commence working immediately (pending an overdue ruling) would significantly protect workers from intentional or unintentional delay.

The court of appeals' upholding of Houston's ordinance requiring adult business workers to reapply for work permits if city officials fail to process initial permit applications in a timely manner, *also* conflicts with these Eleventh Circuit decisions. Under those cases, Houston's licensing scheme would be invalid because it does not facially confer automatic licensure or its equivalent on applicants whose permits are not timely processed. Because the scheme would be void ab initio, an applicant in the Eleventh Circuit would never be burdened by the requirement of filing two applications.

---

businesses to open, as of right, with mere *temporary* permits granted when a completed application is filed, do not meet constitutional requirements. The rationale for those decisions is that few entrepreneurs would open a potentially controversial new business with only a temporary permit. *See, e.g., Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1363 (11th Cir. 1999), and *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1313-1314 (11th Cir. 2003). However, unlike adult *businesses* (for which a right to a temporary permit is inadequate), allowing adult business *workers* to commence employment temporarily (after licensing officials have exceeded their deadlines for ruling) *does* provide meaningful and necessary constitutional relief.

Importantly, in the context of a permit requirement for *workers* (as opposed to the Eleventh Circuit cases which involved only adult *business* permit requirements), Petitioners seek even less relief than provided in the Eleventh Circuit cases, i.e., they seek only the right to work *temporarily* pending a licensing ruling, rather than the right to be exempted from the licensing requirement altogether. Particularly in that context, it is hard to imagine what purpose, other than harassment, is served by requiring a license applicant to submit *two* successive applications.

Also, the very availability of the "temporary permit" suggests that municipal officials will *not follow* the applicable initial permit procedures. H.C.O. § 28-254(c)'s ten day requirement for a permit ruling is *mandatory*, not discretionary. Yet, a temporary permit becomes relevant only when city officials have *already violated* the express requirements of the permitting scheme. Consequently, if the officials who administer the temporary permit process are the same ones who ignored the requirements of § 28-254(c) in the first place, there is every reason to believe that the temporary permit may not issue "immediately" as also required by the ordinance.

Finally, a permitting scheme which affords no remedy for licensing delay poses a heightened danger where speech is concerned. The mere requirement of making a second trip to the police department to fill out a second application may well deter job applicants. Of those who nonetheless persevere, many may eventually give up if they must wait more than 10 days for a work permit, with no assurance of when, if ever, such permit will issue. Such deterrence may potentially be the *goal* of licensing delay, and the danger of such treatment is all the greater under a content-based licensing scheme like this one.

As Justices Souter and Kennedy recently noted, concurring in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, ___ U.S. ___, 124 S.Ct. 2219, 227-228 (2004): "[A]lthough Littleton's ordinance is not as suspect as censorship, neither is it as innocuous as common zoning. It is a licensing scheme triggered by the content of expressive materials to be sold. . . . Because the sellers may be unpopular with local authorities, there is a risk of delay in the licensing and review process."

For these reasons, the First Amendment cannot tolerate a scheme for licensing expressive business activity which fails to provide a meaningful safeguard against the imposition of *de facto* censorship by officials who by design or innocent bureaucratic delay, fail to comply with applicable licensing deadlines.

Because of the conflict in the circuits on this point, this Court is urged to resolve this important question of prior restraint law.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN H. WESTON*
G. RANDALL GARROU
CATHY E. CROSSON
JEFFREY F. ALLEN
WESTON, GARROU & DEWITT
12121 Wilshire Blvd., Suite 900
Los Angeles, California 90025
(310) 442-0072

Attorneys for Petitioners

**Counsel of Record*

APPENDICES

VOLUME I

Appendix A — Fifth Circuit Court of Appeals Opinion (November 25, 2003).....App. 1

VOLUME II

Appendix B — District Court Amended Memorandum Opinion and Order of June 9, 1998 [Amending Opinion of February 18, 1998] .....App. 63

VOLUME III

Appendix C — District Court Supplemental Memorandum Opinion And Order of June 11, 1998 [Initial Decision on Reconsideration].....App. 300

Appendix D — District Court Memorandum Opinion And Order Regarding Conspicuous Display Requirement of August 3, 1998 [Additional Supplemental Opinion on Reconsideration] .....App. 432

Appendix E — Fifth Circuit Opinion on Rehearing (May 28, 2004) .....App. 445

Appendix F — Houston Ordinance No. 97-75 .....App. 455

Appendix G — Houston Ordinance No. 86-323 .....App. 491

Appendix H — District Court's Order Of Severance of August 28, 1998 .....App. 508

Appendix I — District Court's order of Final Judgment of August 31, 1998.....App. 509

APPENDIX A

352 F.3d 162

United States Court of Appeals,
Fifth Circuit.

N.W. ENTERPRISES INCORPORATED; Amethyst Enterprises Inc.; Campus Investments Incorporated; 1431 West 18th, Inc., Plaintiffs-Appellees, FTU Inc.; DAJO Inc.; Ice Embassy Inc.; Texas Richmond Corporation; Andrea Stafford; Frank I. Kent; Naomi L. Parrish; Ann Marie Hasselbach; Jeanne L. Grigsby; Susan Boyle; Dana Lynn Thomas; Kimberly Ann Dushman; Michelle Hadley; Colleen Cloer; Leah Marie Wilson; Carla K. Eaton; Cheryl Thompson; Robert G. Furey; HFR Enterprises, Inc.; Andrea Hill; Gina Oliver; Heather Weldin; Charisma Barry; Donna Soto; Andrea Allbright Marco; AHD Houston Inc., a Texas Corporation d/b/a Centerfolds; DNW Houston, Inc.; Parabar Co., doing business as Paradise Club; Jane Doe One, Applicants; Jane Doe Two, Applicants; Dee & Dee Enterprises, Inc.; 9924 I-45 North, Inc.; Hi-Houston, Inc.; Charles Wesley, Inc.; Chil Soung, Inc., doing business as BJ's 24 Hour Newsstand; Daris, Inc., doing business as Riveria Cabaret; GNCD, Inc., doing business as Fantasy South; Rude Dog II, Inc., doing business as Scores Cabaret; Lone Starr Multi Theatres, Inc., doing business as Cinema West; AVW, Inc., doing business as Adult Video Megaplexxx; CLMS, Inc., doing business as 24 Hour Video & News; C-Snap, Inc., doing business as Interludes; East Bay, Inc., doing business as East Tex 24 Hour News & Video, doing business as Hempstead Adult Bookstore, none, doing business as XTC Cabaret Center; TNT Services, Inc., doing business as Xcalibur; 9834 Jensen, Inc., doing business as Harlem Knights; 8503 North Freeway, Inc., doing business as Fantasy Cabaret; Corporate Clubs of Texas, Inc., doing business as Fantasia I XTC; US Clubs, Inc., doing business as

Fantasia III XTC; XTC Cabaret, Inc., doing business as XTC; DHL Inc., doing business as Executive XTC; Cherie Feldman, doing business as Executive Playmates; Eve Enterprises, Inc., doing business as Club Royale; Long Tran, doing business as Ellington Newsstand; Nien X. Nguyen, doing business as DT Video; WMF Investments, Inc., doing business as Chesapeake Bay; AKM, Inc., doing business as Gigi's Cabaret; DHR, Inc., doing business as Hi-10 Cabaret; Panah, Inc., doing business as Mirage Cabaret; R&R Entertainment, Inc., doing business as Moments Cabaret; SSD Enterprises, Inc., doing business as Ritz Cabaret; HHE, Inc., doing business as Passion Cabaret; F&R Club, Inc., doing business as Silk Bar & Grill Cabaret; Atcomm Services, Inc., doing business as Broadsteets; Houman Shaghagi, doing business as Foxxy's Cabaret; Southeast Texas Ventures, A Texas Joint Venture, doing business as The Trophy Club; KMRC, Inc., doing business as LaChatte; Aris Mylonas, doing business as Baby Dolls Saloon; MK Club & Restaurants, Inc., doing business as Moulin Rouge; 10128 TDC 1, Inc., doing business as Texas Dolls Cabaret; Southwest Clubco, Inc., doing business as Playmates; Duncan Burch, Inc., doing business as Michael's International; Obsession Cabaret, Inc., doing business as Obsession Cabaret; Norman R. Glenn, doing business as West Mt. Houston Newsstand, doing business as Far West News, doing business as Highway 6 Newsstand; James Drew, doing business as Gold Touch Stress Clinic and Velvet Touch Stress Clinic; Pete Caserly, doing business as Northwest News; A to X Video, doing business as Pacific Management Enterprises; Hughes & St. Clair, Inc., doing business as Pacific Management Enterprises; Quasar International, Inc., doing business as Pacific Management Enterprises; Video News, Inc., doing business as Pacific Management Enterprises; Chuck Wesley, doing business as Pacific

Management Enterprises; Chuck Wesley, Inc., doing business as Northwest News; Jacob Borenstein, doing business as Northwest News; 12851-59 Westheimer, Inc.; 608 West Mt. Houston, Inc.; Gino A. Barone, doing business as Ban Management Co., also known as Consolidated Video, doing business as Hillcroft News & Video, doing business as Telephone Road News & Video; Heaven Video & News; Airline Video and Thai Company; City Wide Group, Inc., doing business as Studz News; ANS, Inc., dba Lone Star News, doing business as Lone Star News, Northstar, Inc., dba North Freeway News; Northeast, Inc., dba Gulf Freeway News, doing business as Gulf Freeway News; Eastex 24-Hour Newsstand; G.W. Rogers; R. Glass; G. Humphrey; D.L. Stoneham; L.J. Putterman; M. Roberts; V.L. Auzston; J.J. Langen; H. Perez; A. Lucke; Y. Hinojosa; A.N. McMillen; B. Webb; R. Sternes; S. Mongonia; K. Martin; N. Roberts; V. Gobea; D. Quick; K. Warren; R. Sanchez; S. Jurek; N. Espinoza; C. Emery; K. Martin; C. Combs; J. Dampier; W. Kalinowski; J. Crenshaw; L.M. Bates; H. Mactavish; T. Dove; E. Castillo; K.K. Hannan; C.J. Sharpe; A.A. Cook; N. Bailey; T.R. King; L.B. Meagher; N. Henry; A. Bailey; D. Dodson; J. Suarez; A.N. McMillan; K. Rosenberry; C. Garcia; M. Fisher; D.M. Muenzler; T.J. Oakley; D. Carswell; A. Kelly; T. Western; K.A. Radar; L. Phillips; T. Jones; A. Gibson; G. Pierce; N. Neuenfeldt; T. Allen; S.L. Whittenburg; P.A. Buffin; C. Vaughn; T.L. Aldape; S.Y. Noreno; L. Tauarez; T. Dardas; N. Barry; T. Standride; J.D. Burden; S.S. Salazar; H.L. Lococo; S. Brady; S. Nnoli; E.I. Street; D. Jorgenson; D.G. Lewis; P.Z. German; J.M. Rogers, Jr.; B. Templemire; R. Duncan; J. Easterwood; J.C. Acres; W. Templemire, Jr.; Trumps, Inc., doing business as Rick's Cabaret, A Texas Corporation; Andrew Sefia, doing business as Rumors, and others similarly situated; D. Houston, Inc., doing business as Treasures, a Texas Corporation; S.E. Management, Inc., doing business as

Northshore Video and News, Jeana Wiley, Operator of Southeastern Management; Norman S. Harrison, Intervenor Plaintiffs-Appellees-Cross-Appellants, Elgin Investment Company, Ltd., doing business as French Quarter Theater; KQ Investments, doing business as Amenity Caberet; Mark Thai Do; doing business as Dong Kyong Modeling Studio; DSSS Aria Merica, Inc., doing business as Solid Platinum, a Texas Corporation; Marketing Organization of America, Inc., doing business as Exclusive Tanning, a Texas Corporation; Budget Distributors, Inc., doing business as Franc's of Beverly Hills, a Texas Corporation; Michael D's Restaurant, Inc., doing business as Houston Salon & Fitness Center, doing business as Texas Health Salon, a Texas Corporation; Le Crazyhorse Cabaret Astrodome, Inc., doing business as Malibu Resorts, doing business as Sensational Impressions, a Texas Corporation; EPZ Trading Company, doing business as Texas Health Salon, a Texas Corporation; Deux Soeur Enterprises, Inc., doing business as Native Tan, a Texas Corporation; Limerick, Inc., doing business as Video Specials, a Texas Corporation; Your A to X Video Outlet, Inc., a Texas Corporation, Intervenor Plaintiffs-Appellees,

v.

CITY OF HOUSTON,

Defendant-Appellant-Cross-Appellee.

N.W. Enterprises Incorporated; Amethyst Enterprises, Inc.; Campus Investments Incorporated; 1431 West 18th, Inc.; Plaintiffs-Appellees-Cross-Appellants, FTU Inc.; DAJO, Inc.; Ice Embassy, Inc.; Texas Richmond Corporation; Andrea Stafford; Frank I. Kent; AHD Houston, Inc., a Texas Corporation d/b/a Centerfolds; DNW Houston, Inc.; Parabar Co., doing business as Paradise Club; Jane Doe One, Applicants; Jane Doe Two, Applicants; Dee & Dee Enterprises, Inc.; 9924 I-45 North, Inc.; Hi-Houston, Inc.; Charles Wesley, Inc.; D Houston, Inc., doing business as Treasures, a

Texas Corporation; HFR Enterprises, Inc.; Andrea Allbright Marco; Naomi L. Parrish; Ann Marie Hasselbach; Jeanne L. Grigsby; Susan Boyle; Dana Lynn Thomas; Kimberly Ann Dushman; Michelle Hadley; Colleen Cloer; Leah Marie Wilson; Carla K. Eaton; Andrea Hill; Gina Oliver; Heather Weldin; Charisma Barry; Donna Soto; Cheryl Thompson; Robert Furey, Intervenor Plaintiffs-Appellees-Cross-Appellants,

and

Chil Soung, Inc., doing business as BJ's 24 Hour Newsstand; et al. (referred to as Chil Soung Appellants), Intervenor Plaintiffs-Appellees-Cross-Appellants,

KQ Investments, doing business as Amenity Cabaret; Mark Thai Do, doing business as Dong Kyong Modeling Studio; Norman S. Harrison; DSSS Aria Merica, Inc., doing business as Solid Platinum, a Texas Corporation; Marketing Organization of America, Inc., doing business as Exclusive Tanning, a Texas Corporation; Budget Distributors, Inc., doing business as Franc's of Beverly Hills, a Texas Corporation; Michael D's Restaurant, Inc., doing business as Houston Salon & Fitness Center, doing business as Texas Health Salon, a Texas Corporation; Le Crazyhorse Cabaret Astrodome, Inc., doing business as Malibu Resorts, doing business as Sensational Impressions, a Texas Corporation; EPZ Trading Company, doing business as Texas Health Salon, a Texas Corporation; Deux Soeur Enterprises, Inc., doing business as Native Tan, a Texas Corporation; Limerick, Inc., doing business as Video Specials, a Texas Corporation; Your A to X Video Outlet, Inc., a Texas Corporation; Elgin Investment Company, Ltd., doing business as French Quarter Theater,
Intervenor Plaintiffs-Appellees,

v.

City of Houston, Defendant-Appellant-Cross-Appellee.

Nos. 98-20255, 98-20885.

Nov. 25, 2003.

Gerald E. Hopkins (argued), Langtry, TX, for Plaintiffs-Appellees, Vista Video Corp. and Skyock.

David Allen Furlow, Thompson & Knight, Houston, TX, for FTU, Inc., DAJO, Inc., Ice Embassy, Inc., Texas Richmond Corp., Stafford and Kent.

Joe William Meyer, Meyer, Knight & Williams, Houston, TX, John Haldane Weston, G. Randall Garrou (argued), Weston, Garrou & DeWitt, Los Angeles, CA, for FTU, Inc., DAJO, Inc., Ice Embassy, Inc., Texas Richmond Corp., Stafford, Kent, Parrish, Hasselbach, Grigsby, Boyle, Thomas, Dushman, Hadley, Cloer, Wilson, Eaton, Thompson, Furey, HFR Enterprises, Inc., Hill, Oliver, Weldin, Barry, Soto and Marco.

John E. Hill, Houston, TX, for Elgin Inv. Co. Ltd.

Mike J. DeGeurin, Foreman, DeGuerin, Nugent & Gerger, Donald B. McFall, McFall, Sherwood & Breitbeil, Joseph Matthew Grant, The Grant Law Firm, Houston, TX, for AHD Houston, Inc., DNW Houston, Inc., Parabar Co., Jane Doe Two and Houston, Inc.

Becki M. Fahle, John J. Fahle, III, Carter & Fahle, San Antonio, TX, for Dee & Dee Enterprises, Inc., 9924 I-45 North Inc., Hi-Houston, Inc. and Charles Wesley, Inc.

Philip W. Boyko, Houston, TX, for Do and Harrison.

L. Paul Decuir, Jr., Channelview, TX, for DSSS Aria Merica Inc.

Beatrice A. Mladenka-Fowler (argued), Mladenka-Fowler & Associates, Gilbert D. Douglas (argued), Donna

L. Edmundson, The City of Houston Legal Dept., Houston, TX, Michael Acuna, Dallas, TX, for City of Houston.

Nelson T. Helsley, Houston, TX, for Intervenors Plaintiffs-Appellees-Cross-Appellants and XTC Cabaret, Inc.

Appeals from the United States District Court for the Southern District of Texas.

Before GARWOOD, JONES and STEWART, Circuit Judges.

EDITH H. JONES, Circuit Judge:

These appeals and cross-appeals by the City of Houston and regulated entities arise out of an action brought by 105 individuals and 88 adult entertainment establishments challenging the City of Houston's 1997 amendments to its ordinances governing sexually oriented businesses (SOBs). We overrule the district court's determination that certain provisions of the amendments should be treated as content-based and thus subject to strict scrutiny. Instead, all of the provisions of City Ordinance 97-75 challenged on First Amendment grounds should be subjected to intermediate scrutiny. We reverse and remand the court's holding that invalidated the provisions of the amendments that extended the distance regulations for SOBs. We dismiss for lack of appellate jurisdiction the court's partial rulings on the provisions that included public parks and redefined multi-family dwellings for purposes of establishing buffer zones between SOBs and protected land uses. We affirm the district court's judgment in nearly all other respects.

BACKGROUND

City Ordinance 97-75 is the most recent in a long line of ordinances enacted by the City of Houston to regulate SOBs.[1] In 1977, the City enacted Ordinances 77-1259 and 77-1260, which prohibited the operation of adult commercial establishments within 2,000 feet of any church, school, or other educational or charitable institution. *N.W. Enters., Inc.,* 27 F.Supp.2d at 770. This ordinance was struck down by a federal district court on First and Fourteenth Amendment grounds; on appeal this court did not reach the constitutional issues. *Id.*

The City of Houston enacted new ordinances in 1983, 1985, 1986, 1991, and 1997. Under the 1985 version of the ordinance (as amended in 1986), SOBs were prohibited from operating within 750 feet of a school, church or place of worship, or daycare center; or within 1,000 feet of any other SOB, or on any other tract of land for which seventy-five percent or more of the tracts within a 1,000-foot radius were residential. *Id.* The 1985/1986 ordinance also regulated the exterior decor and signage of SOBs. *Id.* These regulations were upheld against various constitutional challenges in *SDJ, Inc. v. City of Houston,* 837 F.2d 1268 (5th Cir.1988), *cert. denied sub nom., M.E.F. Enters., Inc. v. City of Houston,* 489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989).

Ordinance 97-75 was enacted on January 15, 1997. It significantly amended Houston's ordinances governing SOBs. Several aspects of 97-75 are challenged in this case:

---

[1] For a more detailed recounting of the history of the City of Houston's regulation of SOBs, *see N.W. Enters., Inc. v. City of Houston,* 27 F.Supp.2d 754, 770-72 (S.D.Tex.1998).

(1) the increase in the minimum distance from 750 feet to 1,500 feet between an SOB and protected land uses; (2) the addition of public parks to the list of protected land uses; (3) the increased importance of multi-family dwellings in determining whether an area is at least seventy-five percent residential; (4) regulations of "adult mini-theatres"; (5) delayed implementation and amortization provisions; (6) added restrictions on exterior signs; (7) added requirements regarding interior lighting, design and layout; and (8) licensing of managers and entertainers.

The appellees filed suit a week after the ordinance was enacted. In 1998, the district court granted summary judgment on most of the issues in the case.[2] The district court held that the portion of the ordinance increasing the distance requirements was an unconstitutional content-based regulation that must be reviewed with strict scrutiny under the First Amendment. The court denied summary judgment on whether it was constitutional to add public parks to the list of protected uses and on the modification of the treatment of multi-family dwellings, finding genuine issues of material fact as to whether there would be sufficient alternative avenues of communication for the SOBs if these modifications were upheld. The court upheld nearly all of the provisions of the ordinance related to exterior and interior appearance, implementation and

[2] The district court issued three separate opinions: (1) Amended Memorandum Opinion and Order of June 9, 1998, *N.W. Enters., Inc.*, 27 F.Supp.2d at 754; (2) Supplemental Memorandum Opinion and Order of June 11, 1998, *N.W. Enters., Inc.*, 27 F.Supp.2d at 860; and (3) Amended Memorandum Opinion and Order Regarding Conspicuous Display Requirement of August 10, 1998, *N.W. Enters., Inc.*, 27 F.Supp.2d at 913.

amortization, finding that they were content-neutral regulations that survive intermediate scrutiny. The court subjected the signage provision's application to § 216 of the Texas Local Government Code. The court upheld the regulations pertaining to adult mini-theatres. The court upheld the permit requirements for entertainers and managers under intermediate scrutiny but enjoined the City of Houston from requiring on individuals' applications the disclosure of personal phone numbers, home addresses, and criminal record information beyond what the Ordinance uses in granting or denying a permit. The court also enjoined the City from requiring managers to conspicuously display personal identification cards while working in SOBs, as it found this requirement a content-based regulation that does not withstand strict scrutiny.

STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir.1995) (en banc). Summary judgment is appropriate when, viewing the evidence and all justifiable inferences in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hunt v. Cromartie*, 526 U.S. 541, 552, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999); *see also* Fed.R.Civ.P. 56(c). If the moving party meets its burden, the non-movant must designate specific facts showing there is a genuine issue for trial. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc). We review questions of statutory interpretation *de novo*. *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir.1999).

DISCUSSION

Several dozen issues are raised on appeal by the parties. Overarching the discussion are the questions whether strict or intermediate scrutiny governs the constitutional analysis of the Ordinance and whether the Ordinance generally violates state constitutional or statutory provisions. We will discuss these issues first. Next we will address 97-75's provisions that limit the location of SOBs. The interpretation and constitutionality of amended regulations for the physical structure and exterior signage of SOBs comprise the third section of the opinion. Finally, we consider issues surrounding the licensing of SOB employees.

I. General Issues

A. Strict or Intermediate Scrutiny

While no sea change occurred in the constitutional status of SOBs during the pendency of this case on appeal, the Supreme Court refined the *Renton* test[3] in the interim, *see City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), and partially superseded the district court's analysis. In *Alameda Books*, the Court majority (including Justice Kennedy in a separate concurrence) reaffirmed the three-part *Renton* test, which considers (a) whether a sexually oriented business zoning ordinance is a time, place and manner regulation; (b) whether the ordinance is aimed at the content of sexually-oriented speech (content-based) or the "speech's" secondary effects on the community (content-neutral); and

[3] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986).

after passing those tests, (c) whether the ordinance is designed to serve a substantial governmental interest and leaves open reasonable alternative avenues of communication. *See Alameda Books,* 535 U.S. at 433-34, 122 S.Ct. at 1733-34, citing *City of Renton,* 475 U.S. at 47, 106 S.Ct. at 930.

In that opinion, the Court expressly distinguished between the second and third parts of the *Renton* test, explaining that:

> The former requires courts to verify that the "predominate concerns" motivating the ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]." The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the Ordinance and the secondary effects that motivated the adoption of the Ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects.

Id. at 440-41, 122 S.Ct. 1728 (quoting *Renton,* 475 U.S. at 47, 106 S.Ct. 925) (alterations in original). According to the majority, intermediate scrutiny applies to SOB regulations whenever the governmental entity was predominantly concerned with regulating secondary effects of adult speech. Justice Kennedy agreed that "the central holding of *Renton* is sound: a zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring). Consequently, while Justice Kennedy takes issue with the plurality's use of the content-based/content-neutral dichotomy in

these cases, he, too, would apply the intermediate scrutiny standard to regulate secondary effects of adult speech so long as a municipal regulation does not ban the protected speech.

The district court intermingled the second and third prongs of the *Renton* test in a way rejected by the *Alameda Books* majority. To determine the City's "predominant concern," the district court felt it should ascertain "whether the City Council relied on evidence in the legislative record from which it could have determined that negative secondary effects associated with adult businesses actually exist *and* that the proposed regulations would in some way address these effects." *N.W. Enters., Inc.*, 27 F.Supp.2d at 776 (emphasis added). The district court required this double proof before assessing the standard of review (strict or intermediate scrutiny) applicable to each provision of 97-75. For example, in discussing whether the provision that increased from 750 to 1,500 feet the distance an SOB must be located from certain land uses was content-neutral or content-based, the court repeatedly stated that there was no evidence in the record before the City Council that SOBs caused secondary effects more than 750 feet but less than 1,500 feet away. *N.W. Enters., Inc.*, 27 F.Supp.2d at 805, 870, 875. *Alameda Books* forecloses this approach.

The standard of constitutional scrutiny, after *Alameda Books,* and taking into account Justice Kennedy's concurrence, is simply whether Ordinance 97-75 addressed secondary effects of adult speech, as demonstrated by the legislative record submitted by the City. Even before *Alameda Books,* however, neither the Supreme Court nor this court required proof of the efficacy of an ordinance in order to determine the constitutional review standard. This court has invariably analyzed ordinances regulating

SOBs as content-neutral time, place, and manner restrictions where the legislative record demonstrated that the municipality's predominant concern was to regulate secondary effects of SOBs and not to censor the expression itself.[4] Thus, in *SDJ, Inc.*, as in other cases, this court treated the ordinance at issue as a content-neutral regulation where "the *findings of the Houston council as to the secondary effects* of sexually oriented businesses satisfy [the court] . . . that the city's predominant concern was with secondary effects and not the content of expression itself." 837 F.2d at 1273 (emphasis added).[5] This line of case fulfills *Renton*, which, while reiterating that legislators' subjective motivations alone cannot condemn an otherwise constitutional statute, cited as sufficient the purpose of the city's ordinance. *Renton*, 475 U.S. at 48, 106 S.Ct. at 929, quoting *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1683, 20 L.Ed.2d 672 (1968).

---

[4] *See, e.g., Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 291 (5th Cir.2003) (treating ordinance as content-neutral where this court had previously found that the city had specific evidence of secondary effects); *LLEH, Inc. v. Wichita County, Tex.*, 289 F.3d 358, 368 (5th Cir.2002) (finding adequate evidence that county's predominant concern was reducing secondary effects where legislature gathered evidence of secondary effects related to SOBs and the measures taken by other legislatures); *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1258-59 (5th Cir.1992) (analyzing SOB ordinance as content-neutral where the city council made findings supported by evidence that SOBs have harmful effects on the community).

[5] The district court appears to have misread *SDJ*, as it cited two paragraphs of that opinion dealing with the third *Renton* inquiry, transposing an inapposite discussion to *Renton*'s content-based/content-neutral second inquiry. *See N.W. Enters., Inc.*, 27 F.Supp.2d at 777 (citing *SDJ*, 837 F.2d at 1274). *SDJ* applied across-the-board intermediate scrutiny to Houston's ordinance without proof of efficacy under *Renton*'s second prong. *See* 837 F.2d at 1273.

Because that ordinance's expressed purpose was to "'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views," *id.*, the Court deemed it content-neutral.

Further, the City need not demonstrate that the City Council actually relied upon evidence of negative secondary effects when it enacted 97-75. A local government can justify a challenged ordinance based both on evidence developed prior to the ordinance's enactment and that adduced at trial. *J & B Entm't, Inc. v. City of Jackson, Miss.*, 152 F.3d 362, 371-72 (5th Cir.1998) (*citing Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S.Ct. 2456, 2469, 115 L.Ed.2d 504 (1991) (Souter, J., concurring)). This is because the "appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a *current governmental interest* in the service of which the challenged application of the statute may be constitutional."[6] *Barnes*, 501 U.S. at 582, 111 S.Ct. at 2469 (Souter, J., concurring).

To require the legislature to show evidence of negative secondary effects and of the new regulations' efficacy requires too much of the City at this stage in the inquiry. Disputes over the effectiveness of the proposed regulations

---

[6] As Justice Souter further noted: "At least as to the regulation of expressive conduct, 'we decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislator] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator had made a "wiser" speech about it.'" *Barnes*, 501 U.S. at 582, 111 S.Ct. at 2469 (Souter, J., concurring) (quoting *United States v. O'Brien*, 391 U.S. 367, 384, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

are properly reserved for the final prong of the *Renton* analysis. *See, Alameda Books, supra.*

The Houston City Council made express findings of adverse secondary effects related to SOBs and the City's interest in ameliorating those effects. The preamble to 97-75 states:

> WHEREAS, the City Council finds that sexually oriented businesses can exert dehumanizing influences on churches, schools, and day care centers, can have negative effects on property values, [and] can contribute to increased criminal activities in the surrounding areas . . . and . . .
>
> WHEREAS, the City Council finds that comprehensive new land use studies by the Department of Planning and Development demonstrate that increasing such distances to 1,500 feet would not unduly impact the availability of conforming sites for sexually oriented businesses; and
>
> WHEREAS, the City Council finds that increasing such distances to 1,500 feet would provide additional and needed protection to the community from the adverse effects of sexually oriented businesses without depriving such businesses of adequate opportunities to locate within the City; and
>
> WHEREAS, the City Council finds that Article III of Chapter 28 of the Code of Ordinances should be amended to enhance provisions regarding signage, configuration, conduct of entertainment, age of admission and related matters to reduce the secondary effects of sexually oriented businesses upon the community and further protect the health, safety and welfare of the public; and

> WHEREAS, the City Council finds that sexually oriented businesses provide enhanced opportunities for employee participation in various forms of criminal activities, including prostitution, lewd conduct, indecent exposure, obscenity law violations and related crimes that are associated with sexual conduct or sexually-oriented materials; and
>
> WHEREAS, the City has a substantial public concern that its residents be protected from criminal activity and be protected from casual sexual activity that facilitates the spread of sexually transmitted diseases. . . .

Preamble to Ordinance 97-75, at 2, 4.[7] Further, as part of its summary judgment materials, the City introduced sections of the legislative record supporting its current and former SOB ordinances. *See N.W. Enters., Inc.*, 27 F.Supp.2d at 803 n. 103. That legislative record was held sufficient by this court to justify characterizing Houston's prior SOB ordinance as content-neutral. *See SDJ, Inc.*, 837 F.2d at 1273.

Together, these materials justify the conclusion that the City's predominate concern was to regulate the secondary effects of SOBs. Under either the plurality opinion or Justice Kennedy's concurrence in *Alameda Books,* intermediate scrutiny applies. The City need not relitigate this

---

[7] An eight-member committee of the Houston City Council that proposed 97-75 specifically described its increased distance regulations as a means "to protect such land uses from the adverse secondary effects of SOBs," "without unduly restricting availability of conforming locations for sexually oriented businesses to operate." The Committee report systematically explains the need for the regulations effected by 97-75 in terms of the adverse secondary effects of SOBs, including increased crime, illicit sexual conduct, and narcotics violations.

issue every time its SOB ordinances are challenged. As Justice Souter observed: "Given our recognition that 'society's interest in protecting this type of expression is wholly different, and of lesser, magnitude, than the interest in untrammeled political debate,' I do not believe that a State is required affirmatively to undertake to litigate this issue in every case." *Barnes,* 501 U.S. at 584-85, 111 S.Ct. at 2470 (Souter, J., concurring); *see also City of Erie v. Pap's A.M.,* 529 U.S. 277, 296-98, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (O'Connor, J., opinion joined by Rehnquist, C.J., Kennedy and Breyer, JJ.) (city can rely on the evidentiary foundation found in other Supreme Court cases regarding secondary effects); *Encore Videos, Inc. v. City of San Antonio,* 330 F.3d 288, at 291 (5th Cir.2003) (opinion on reh.) (where a predecessor ordinance was sufficiently supported to apply content-neutral review, same findings were sufficient to consider a subsequent ordinance content-neutral); *BGHA LLC v. City of Universal City, Texas,* 340 F.3d 295 (5th Cir.2003).

Because the constitutional standard of review depends only upon the City's predominate legislative concern, not its pre-enactment proof that the ordinance would work, there is no reason to parse each provision of the ordinance separately to determine the standard of review. The district court's conscientious methodology, bred by its misapplication of the second prong of *Renton,* was flawed in this respect. In fact, all parties seem to recognize the court's error; although differing in which level of scrutiny they advocate, they urge us to apply one level consistently to the Ordinance. The purpose and scope of the entire Ordinance are reflected in the above-quoted preamble, which summarizes City Council's concern about multiple effects of SOBs. That all of such effects are targeted by the

Ordinance's various provisions is clear, as it is also clear that none of the provisions directly censors adult speech. Thus, the Preamble, together with the legislative record, provides sufficient evidence to justify an intermediate scrutiny standard of review to the entirety of 97-75, as a content-neutral enactment.

B. The "Shell Game" Argument

Appellees argue that it is unconstitutional for a city to change the rules repeatedly, with retroactive impact, and to affect drastically the overwhelming majority of existing adult businesses each time. The district court rejected what the SOBs describe as a "shell game" argument, observing that the City "has the prerogative of experimenting with different possible solutions to municipal problems even when dealing with First Amendment interests."[8] *N.W. Enters., Inc.*, 27 F.Supp.2d at 882 (citing *City of Renton*, 475 U.S. at 52, 106 S.Ct. at 931). The district court further noted that the plaintiffs "cited no authority for the proposition that enacting a significant change of rules for adult businesses, even for a second time, in and of itself violates the First Amendment." *Id.*

On appeal, no relevant legal authority has been cited in support of the "shell game" argument.[9] Moreover, the

---

[8] The district court explained however, that each change to the ordinance must satisfy "the requisite constitutional test." *Id.*

[9] FTU does cite some cases only for the purpose of declaring them inapplicable. Moreover, in its opening brief, FTU cites *Gammoh v. City of Anaheim*, 73 Cal.App.4th 186, 86 Cal.Rptr.2d 194 (Cal.Ct.App.1999) in support of its shell game argument. In *Gammoh*, the court held that the City of Anaheim could not deny a permit to a sexually-oriented business that met all the requirements to obtain a permit on the basis that the City may plan to "redevelop" the area in the future. *Id.* at 199.

(Continued on following page)

SOBs have not attempted factually to support their contention that the City's course of amendments has successively put SOBs out of business. Their argument also fails, because, as stated by the district court, it conflicts with the authority expressly reserved to cities in *City of Renton,* and reaffirmed in *Alameda Books,* to experiment with different possible solutions to municipal problems. *Renton,* 475 U.S. at 52, 106 S.Ct. at 931; *see also Alameda Books,* 535 U.S. at 434, 122 S.Ct. at 1736-37. Appellees' broad argument, if accepted, would hobble municipalities.

C. Article I, Section 8 of the Texas Constitution

AHD contends that Article I, Section 8 of the Texas Constitution affords broader free speech rights to those involved in sexually oriented businesses than does the federal Constitution. This argument is foreclosed by Fifth Circuit precedent. *Woodall v. City of El Paso,* 49 F.3d 1120, 1127-28 (5th Cir.1995). Since *Woodall* was written, neither the Texas Supreme Court nor lower state courts have issued any rulings undermining its conclusion.

D. 97-75's Status as a Texas "Zoning Regulation"

AHD argues that Ordinance 97-75 is a "zoning regulation" that was not validly enacted. In Texas, the passage of zoning regulations requires compliance with special procedural rules. But AHD's premise is invalid. This ordinance is no zoning regulation. The district court thoroughly and

---

FTU makes no effort to explain why this analysis should apply in the instant case.

completely rejected this argument. *N.W. Enters., Inc.*, 27 F.Supp.2d at 795-98.

First, while the Texas Supreme Court characterized certain ordinances, which restricted the permissible locations of mobile homes, as "hav[ing] the effect of a zoning regulation," the court also held that the regulations were not "zoning regulations." *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 793 n. 4 (Tex.1982). Second, AHD cites no authority to support its argument that prohibiting adult businesses from locating within 1,500 feet of churches, schools, day care centers, parks, and residential areas would produce hundreds of 162-acre regulated areas and would effectively comprise a comprehensive land use plan tantamount to zoning.

Finally, AHD observes that this and other courts have described regulations similar to those in 97-75 as zoning ordinances. For example, this court described the predecessor to 97-75 as "a detailed ordinance imposing licensing and zoning restrictions upon sexually oriented businesses" and described the ordinance adjudicated in *City of Renton* as "a city zoning provision similar to the Houston ordinance." *SDJ*, 837 F.2d at 1271, 1273. The use of generic terminology in federal court opinions is a far cry from a legal holding that the Houston ordinance amounts to zoning under Texas law.

II. 97-75's Provisions Regarding the Location of SOBs and the Treatment of Multi-family Dwellings and Public Parks as Protected Uses

The district court split the amended locational restrictions on SOBs into three parts: the expansion from 750 to 1,500 feet of the buffer zone between SOBs and protected

land uses; the addition of public parks to protected land uses; and the extra weight afforded multi-family residences in the buffer zone calculation.[10] The court then separately determined the constitutional standard of scrutiny for each part of the restrictions according to the methodology we have previously found in error. Additional procedural and substantive complications flow from the court's final complex ruling on locational restrictions. Ultimately, however, the locational restrictions lack only one qualification for being instantly upheld.

First, although the court no doubt acted with the best intentions, it should not have trifurcated the locational restrictions. The court cited no authority to explain why separate constitutional analysis of the components of a buffer zone formula is required, meaningful or practical. That a city may choose to insulate public parks and multi-family residences from SOBs because of the likely presence of children at the protected locations is just as obvious, and done for the same reasons, as the choice of insulating schools, churches, single-family homes and day-care centers.[11] (Houston's ordinance already protected these other land uses.) The material constitutional questions, posed by *Renton*'s third prong, are whether the

---

[10] Section 28-125(b)(1) of 97-75 states that an SOB cannot receive a permit to operate if the SOB is within 1,500 feet of any school, church, public park, or licensed day-care center. Further, Section 28-125(b)(3) of 97-75 prohibits issuance of an SOB permit if seventy-five percent of the tracts in an area within 1,500 feet of the SOBs location are residential in character. Section 28-125(b)(3) also counts a multi-family tract equivalent to eight residential tracts.

[11] Even under its flawed methodology, the district court expressly held that the public parks and multi-family residence components serve a substantial governmental interest.

buffer zone *in toto* addresses substantial governmental interests and leaves sufficient alternative avenues of communication. Thus, the City was required to justify its buffer zone in light of all the protected uses it might define. The City's burden is substantial even without its having to foresee, and separately map out, the possibilities that would arise from a court's picking and choosing among each individual protected use. Here, for instance, the court was requiring the City to provide information on the separate impacts of public parks and the recalculated multi-family residence formula on the number of alternative sites available for SOBs. Given such facially legitimate protected land uses, however, the court should have analyzed the locational restrictions adopted by the City rather than hypothetical variations it created by deconstructing the buffer zone rule.

Second, the court's trifurcation creates a question of appellate jurisdiction, which we consider sua sponte. The court certified for review under Fed. R. Civ. Proc. 54(b) its decision that the 1,500-foot buffer zone, increased from 750 feet, is "content based" and unconstitutional under a strict scrutiny standard. The court also certified as a "final" judgment under Rule 54(b) its partial approval of the public parks and multi-family residence components of the buffer zone, but, finding fact issues extant, it expressly declined to complete the analysis of those components.[12] The latter certifications are flawed, because Rule 54(b) allows a district court to enter final judgment "as to one or

[12] The court held that factfinding was required to determine whether the parks and multi-family residence provisions left sufficient alternative avenues of communication to satisfy *Renton*'s third prong. *See N.W. Enters., Inc.*, 27 F.Supp.2d at 911-12.

more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. . . ." *Eldredge v. Martin Marietta Corp.,* 207 F.3d 737, 740 (5th Cir.2000) (quoting Rule 54(b)). At best, the court certified only elements of what it viewed as separate claims concerning the public parks and multi-family residence components. The certifications satisfy neither the "final judgment" nor "separate claim" requirements of Rule 54(b). Consequently, we lack Rule 54(b) appellate jurisdiction over the public parks and multi-family residence provisions.

The issue thus correctly before us is the constitutionality of the City's amended 1,500-foot locational restriction without considering the public parks and multi-family residence amendments. *See City of Renton,* 475 U.S. at 53-54, 106 S.Ct. at 932. The amended restriction is reviewed under intermediate scrutiny, as was previously explained.[13] Under the *Renton* test, the remaining questions are whether the increased locational restriction addresses substantial governmental interests and allows reasonable alternative avenues of communication.

In *Alameda Books,* the Court determined to "clarify the standard for determining whether an ordinance serves a substantial governmental interest." 535 U.S. at 430, 122 S.Ct. at 1731. The plurality began with a recapitulation of *Renton,* noting that the city there had met its burden of proving that an ordinance prohibiting the location of any SOB within 1,000 feet of protected land uses served a substantial governmental interest. The city had relied on

---

[13] Because the district court erroneously applied strict scrutiny review, its invalidation of this part of 97-75 cannot be sustained.

other cities' studies of the secondary effects of SOBs. With regard to the different type of SOB dispersal ordinance at issue before it in *Alameda Books,* the Court rejected the Ninth Circuit's requiring Los Angeles to prove that the amelioration of secondary effects postulated by its ordinance "is a necessary consequence of" Los Angeles's independent study. *Id.* at 437, 122 S.Ct. at 1735. The Court added that it would not require localities to disprove other possible implications of the legislative materials at their disposal, because *Renton* "specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech." *Id.* at 438, 122 S.Ct. at 1736.[14] Nor would municipalities be required to prove, not merely by common sense, but empirically, that SOB ordinances *will* successfully reduce crime, as this would undermine *Renton*'s allowance of local experimentation in responding to secondary effects. *Id.* at 439, 122 S.Ct. at 1736.

The Court explained its deference to the legislative evidentiary judgment as born of competing policies: that of protecting constitutional speech and that of respecting local legislators' superior understanding of local problems. *Id.* at 440, 122 S.Ct. at 1737. The point of deference is this: legislators cannot act, and cannot be required to act, only on judicial standards of proof. Legislative zoning decisions are generally upheld on a rational basis standard. Imposing a level of intermediate scrutiny, in cases like this, requires more conviction of the connection between legislative ends and means than does the rational basis standard, but only in the sense of "evidence . . . [that] is

[14] Justice Kennedy's concurrence approves the Court's treatment of the evidentiary questions. 535 U.S. at 451, 122 S.Ct. at 1742-43.

reasonably believed to be relevant" to the secondary effects in question. *Alameda Books,* 535 U.S. at 442, 122 S.Ct. at 1738, quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. at 931.

Viewed from the perspective of *Alameda Books,* the City of Houston has proven that its strengthened distance regulation furthers substantial governmental interests. The challengers did not demonstrate that the evidence fails to support the City's rationale or that the City's factual findings are wrong. *Alameda,* 535 U.S. at 439, 122 S.Ct. at 1736 (municipality "cannot get away with shoddy data or reasoning.") Hypothesizing, as the City of Houston did here, that the adverse secondary effects of SOBs, such as increased crime, auto theft, opportunities for prostitution and transmission of sexual diseases, neighborhood blight, and reduced property values would be decreased by dispersing SOBs further from protected land uses, is hardly a new concept. Consequently, after relying on the judgments, both legislative and judicial, that supported its previous SOB distance regulations and after conducting public hearings (with a mailing list of over 1,000 names), receiving hundreds of written submissions,[15] and receiving

[15] It is not unreasonable to expect a local government to be responsive to the concerns of its citizens as expressed through various community institutions. In this case, the support for substantive regulation of SOBs came from organizations that represent homeowners throughout the City of Houston, from the wealthiest to the poorer neighborhoods. The democratic legitimacy that such support affords a legislature is an important consideration for courts to keep in mind when according the legislature the appropriate measure of deference it deserves. *See, e.g.,* R. Doc. 81, Ex. 22B at 16 (Downtown Historic District, Inc.); *id.* at 32 (Southeast Neighborhood Coalition); *id.* at 48 (East Montrose Civic Association); *id.* at 71 (Greater Hobby Area Partnership); *id.* at 79 (Gulf Freeway Oaks Club); *id.* at 80 (Boulevard Oaks Civic Association); *id.* at 114-16 (Houston Heights Association); *id.* at 193 (Midtown Tax Increment Reinvestment Zone No. 2); id. at 223

(Continued on following page)

copious materials from its Planning, Police and Legal Departments, the City concluded that (a) adverse secondary effects of SOBs remain a problem[16] and (b) increasing the distance restriction to as much as 1,500 feet is necessary to restrain those effects.[17] On similar evidence, this court recently found that a Texas city's SOB zoning ordinance fulfilled the "substantial government interest" prong of *Renton*. *See BGHA, LLC v. City of Universal City, Texas, supra.*

The district court alternatively held that the City failed to prove its amended buffer zone is "narrowly tailored" at 1,500 feet, but in light of *Renton,* as explained by *Alameda Books,* requiring proof to this degree of exactitude set the bar too high. The City is entitled to experiment with distance regulations. *See also, SDJ, Inc., supra* at 1276 (courts will not challenge city's legislative decision

---

(Upper Kirby District Association); *id.* at 244 (Southeast Neighborhood Coalition); *id.* at 250 (South Main Center Association); *id.* at 261 (Sharpstown Civic Association); *id.* at 265 (Boulevard Oaks Civic Association and Southampton Civic Club); *id.* at 266 (Richmond/Westheimer Residents Association, Inc.); *id.* at 274 (Neartown Association). The civic associations uniformly supported more rigorous locational restrictions, and several noted that SOBs, by their attraction of crime and undesirable clientele, were hindering efforts to renovate rundown or disadvantaged neighborhoods.

[16] The number of SOBs in Houston has increased substantially since the City enacted its distance regulations in 1983.

[17] There is evidence in the legislative record that increasing the distance to 1,500 feet from redefined residential tracts may actually yield more permissible locations for SOBs, or at the very least does not appreciably reduce the permissible locations, as it increases the circle within which residences may be counted. As a result, the residential component of the larger circle may decrease. Dee & Dee's brief and the district court acknowledge this effect. *See N.W. Enters.*, 27 F.Supp.2d at 880. The district court will of course explore this possibility further on remand.

on the most appropriate distance). Courts should not second-guess such restrictions as long as they are not designed as a subterfuge for banning the protected speech. Here, the hearings, Legal Department advice, SOB Ordinance Revision Committee's Legislative Report, and the Preamble to 97-75 all disclaim any such goal.

The district court's concern with the City's doubling of its buffer zone from 750 to 1,500 feet between SOBs and protected land uses is better placed with *Renton*'s last inquiry, which concerns whether the regulation leaves available sufficient alternative sites for the protected speech. Justice Kennedy's concurrence in *Alameda Books,* a vote necessary to the Court's judgment,[18] emphasizes that the City may not use its regulation to eliminate businesses as a means to reduce their secondary effects. *Alameda Books, Id.* at 451, 122 S.Ct. at 1728. Before enacting 97-75, the City's SOB Ordinance Revision Committee took extensive testimony from Joseph Chow, the Planning Department's executive responsible for determining the practical effect of each of the municipal SOB distance ordinances for the last 20 years. Chow discussed at length in a legislative hearing how the Planning Department, aided by new computer techniques, calculated the availability of potential SOB sites under all of 97-75's locational restrictions.[19] Even with the 1,500-foot requirement, strengthened by the addition of public parks

---

[18] *See Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (rationale of deciding vote on Supreme Court is critical).

[19] Chow's estimates in this regard have been accepted by courts that turned down two previous challenges to Houston's SOB ordinances. *SDJ, Inc., supra; 4330 Richmond Avenue, Inc. v. City of Houston,* C.A. No. 91-0665, 1997 WL 1403893 (S.D.Tex.1997), *aff'd per curiam,* No. 97-20798, 166 F.3d 338, 1998 WL 911994 (5th Cir.1998) (unpub'd).

and recalculation of multi-family residences, Chow estimated conservatively that the City offers thousands of potential SOB sites. After litigation commenced, the City offered the two-page affidavit of a Police Vice Division Officer, Steven Andrews, who asserted that 97-75 affords at least 1,362 *actual* conforming SOB sites and 183 sites that can be operated consistently with the minimum distance between adult businesses. Since there were at most 128 SOBs in Houston when 97-75 was enacted, under any of these estimates it would seem that the City could support its contention that sufficient alternative avenues of communication have been provided.[20]

Like many other issues in this case, however, the path to resolving the question of reasonable alternative sites is not straight. To begin with, the City bears the burden of proving the existence of reasonable alternative sites. *See SDJ, Inc.*, 837 F.2d at 1273 ("Applying [the *Renton*] test requires the City to prove that the Ordinance . . . leaves open alternative channels of communication."). *See also Alameda Books,* 535 U.S. at 434, 122 S.Ct. at 1733-34 (plurality opinion states that the ordinance in *Renton* "would be upheld so long as the City of Renton showed . . . that reasonable alternative avenues of communication remained available"); *Lim v. City of Long Beach,* 217 F.3d 1050, 1054 (9th Cir.2000); *Phillips v. Borough of Keyport,* 107 F.3d 164, 177 (3d Cir.1997) (en

[20] This court has held that the provision of just one more site than the existing number of SOBs satisfies a city's obligation to provide alternative avenues of communication. *Woodall v. City of El Paso,* 49 F.3d 1120, 1127 (5th Cir.1995); *see also Lakeland Lounge v. City of Jackson, Miss.*, 973 F.2d 1255, 1259-60 (5th Cir.1992) (nine sites for six businesses; *Renton* does not require a specific proportion of a municipality be open to adult businesses or a certain number of sites); *Grand Brittain, Inc. v. The City of Amarillo,* 27 F.3d 1068, 1069 (5th Cir.1994).

banc). *But cf. Woodall v. City of El Paso,* 49 F.3d 1120, 1126 (5th Cir.1995) ("The Adult Businesses had the burden of proving that the ordinances . . . fail[ed] to provide reasonable alternative avenues of communication.")

The City did not meet its burden for two technical reasons. First, Chow's testimony to the SOB Ordinance Revision Committee was neither offered by the City nor admitted by the district court for the truth of its contents in the summary judgment proceedings.[21] The district court specifically noted this failing, *N.W. Enters., Inc.,* 27 F.Supp.2d at 877. Second, and somewhat inconsistently, the court also held that the different estimates of reasonable alternative sites made by Chow and Officer Andrews, both of which well exceed the total number of SOBs affected by 97-75, created a genuine, material fact issue on which it declined to rule. *N.W. Enters., Inc.,* 27 F.Supp.2d at 880-81. We agree with the district court and with the SOBs, however, that Andrews' affidavit is too conclusory to be probative for summary judgment purposes.[22] In its one-and-a-half pages, there is neither any explanation of Andrews' methodology nor is a map or other device incorporated by which his conclusion may be verified. The City cannot sustain its burden at this point solely based on Officer Andrews' affidavit.

On remand, further proceedings will be necessary to determine whether there exists any basis for the fear,

---

[21] The district court would have been correct to receive Chow's statements in proper evidentiary form, as against some of the SOB's objections on appeal that he was unqualified to give "expert" testimony. His testimony on Houston's SOB zoning ordinances has been approved twice before in federal courts. *See SDJ, Inc., supra; 4330 Richmond, Inc., supra.*

[22] The SOBs objected to the affidavit below on this basis. *See N.W. Enters., Inc.,* 27 F.Supp.2d at 880-81.

expressed by Justice Kennedy in *Alameda Books, supra,* that the ordinance seeks to reduce secondary effects by depriving SOBs of reasonable avenues of communication. If Chow's legislative testimony is properly admitted, and the City supports Andrews' testimony adequately, and if the SOBs decline, as they did before, to offer controverting evidence, the remaining doubts as to the ordinance's constitutionality in its entirety may be easily dispelled on further summary judgment proceedings.[23]

III. SOB Regulatory Issues

A. Applying 97-75 to Adult Arcades and Mini-Theatres[24]

1. Applicability of 97-75 Article III to the arcades and mini-theatres regulated by Article II

In two footnotes, the district court noted that, while 97-75 Article II applies only to "adult arcades and adult

---

[23] Chow's legislative testimony and Andrews' affidavit both estimated the number of potential SOB sites considering the entirety of 97-75: the 1,500-foot distance regulation and defining public parks and redefined multi-family residences as protected land uses. Since the district court has already upheld parts of the public parks and multi-family residence provisions, the remaining issue concerning alternative avenues of communication should be addressed as to the entirety of the buffer zone regulations on remand.

[24] N.W. Enterprises argues perfunctorily that the district court erred in granting summary judgment to the City on whether the definition of "mini-theatre" in 97-75 § 2:28-81 conflicts with the definition of "adult movie theatre" in § 3:28-121. The district court refused to address this question, holding that it was "not ripe for resolution." *N.W. Enters., Inc.,* 27 F.Supp.2d at 910. In lieu of reasoned analysis, N.W. Enterprises merely states in a wholly unsupported argument that its claim is ripe. A litigant's failure to provide legal or factual analysis results in waiver. *United States. v. Green,* 964 F.2d 365, 371 (5th Cir.1992). Because N.W. Enterprises failed to brief this issue adequately, the point is waived.

mini-theatres," Article III "applies to *all* sexually oriented business enterprises, including adult arcades and mini-theatres." *N.W. Enters., Inc.*, 27 F.Supp.2d at 772 n. 35 (emphasis in original); *see also id.* at 791 n. 81. N.W. Enterprises argues instead that the ordinance, if properly construed, regulates adult arcades and mini-theatres under Article II alone, while Article III regulates all *other* SOB's that are not adult arcades or mini-theatres. We disagree.

Article II of 97-75 governs adult arcades and adult mini-theatres. For purposes of Article II, "adult arcade" and "adult mini-theatre" are defined as "any premises that are subject to regulation under Chapter 243 of the Texas Local Government Code" and as premises where people are permitted to use "arcade devices" or "mini-theatre devices," respectively.[25] *See* 97-75: § 2:28-81. N.W. Enterprises acknowledges that, by incorporating Chapter 243's multi-entity definition of "sexually oriented business," Article II explicitly includes "adult video arcades" and "adult movie arcades" in its scope. It contends, however, that Article III separately regulates "sexually oriented businesses" that fall within the definition of "enterprise" found in § 28-121 of 97-75. Because the Article III definition of "enterprise" does not specifically list these two

---

[25] Chapter 243 of the TEXAS LOCAL GOVERNMENT CODE regulates "sexually oriented business[es]" as defined in § 243.002 of that chapter. Section 243.002 states " 'sexually oriented business' means a sex parlor, nude studio, modeling studio, love parlor, adult bookstore, adult movie theatre, *adult video arcade, adult movie arcade,* adult video store, adult motel, or other commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer." Tex. Loc. Gov't Code Ann. § 243.002 (Vernon 1999).

businesses,[26] N.W. Enterprises argues the distance regulations do not apply to adult arcades and adult mini-theatres.

This argument is flawed for three reasons. First, the list of "enterprises" in § 28-121 of Article III is on its face nonexclusive. After identifying specific businesses within its definition, the ordinance adds the following catch-all phrase: "or any establishment whose primary business is the offering of a service or the selling, renting or exhibiting of devices or any other items to provide sexual stimulation or sexual gratification to its customers. . . ." 97-75, § 3:28-121. Adult arcades and mini-theatres certainly fall within this catch-all provision. Second, adult arcades and mini-theatres are not

---

[26] The Article III definition of "enterprise" reads as follows:

> Enterprise. An adult bookstore, adult cabaret, adult encounter parlor, adult lounge, adult modeling studio, adult movie theatre *or any establishment whose primary business is the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its customers,* and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. The term "enterprise" shall not be construed to include:
>
> (1) Any business operated by or employing licensed psychologists, licensed physical therapists, licensed athletic trainers, licensed cosmetologists, or licensed barbers performing functions authorized under the licenses held;
>
> (2) Any business operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts; or
>
> (3) Any retail establishment whose major business is the offering of wearing apparel for sale to customers.

97-75 § 3:28-121 (emphasis added).

among the businesses explicitly excluded from the enterprise definition. Third, § 28-83 of Article II states that its provisions "are supplemental and shall be cumulative with all other laws and ordinances applicable in any manner to an adult arcade or adult mini-theatre or to any owner or operator thereof." 97-75 § 2:28-83. The district court correctly held that adult arcades and adult mini-theatres are subject to the provisions of Article III of 97-75.

2. The Extension of 97-75 Article II to Cover Mini-Theatres

The City previously regulated only adult arcades, placing licensing and architectural requirements upon them to discourage illicit sexual conduct. Adult arcades are defined as businesses that provide adult entertainment through machine-operated devices intended for viewing by five or fewer people in the same room. Article II of 97-75, however, extends this coverage to adult mini-theatres, businesses that provide adult entertainment through machine-operated devices intended for viewing by more than five, but less than 100, people in the same room. The district court held that the expansion of Article II to cover adult mini-theatres was content-neutral, and that it was narrowly tailored to achieve a substantial governmental interest and allowed operators of adult mini-theatres sufficient alternative avenues of communication. *N.W. Enters., Inc.*, 27 F.Supp.2d at 792; *see also* 826-27.

N.W. Enterprises appeals this holding on two grounds. We reject its initial contention that this amendment was content-based rather than content-neutral and as such is subject to strict scrutiny. As discussed, *supra*, 97-75 is

properly analyzed in its entirety as a content-neutral regulation.

N.W. Enterprises also challenges the district court's holding that the inclusion of adult mini-theatres in Article II allows sufficient alternative avenues of communication. We find no error. To the extent that N.W. Enterprises rests upon the locational issues concerning Article III's provisions regarding public parks and multi-family dwellings, it is misguided. Article II requires permits and controls the structural design of adult arcades and adult mini-theatres but has nothing to do with their geographic location. Thus, whether 97-75's locational restrictions facilitate sufficient alternative avenues of communication does not affect whether Article II's inclusion of mini-theatres leaves open sufficient communicative outlets. In any event, Article II affords adult mini-theatres ample alternative means to convey their erotic message. *See J & B Entm't, Inc.*, 152 F.3d at 378 (holding that regulations that required dancers to wear at least pasties and a G-string left open sufficient avenues of communication). The provisions of Article II in no way limit the message mini-theatres convey.

Thus, the inclusion of mini-theatres in Article II is constitutional under intermediate scrutiny.

B. Amortization and Delayed Implementation Under the Ordinance

1. 180-day amortization period

Ordinance 97-75 § 8(a) provides an amortization period of 180 days following enactment for businesses affected by the distance regulations found in Article III. The ordinance was passed on January 15, 1997, but its enforcement was stayed. At the time of the district court's

decision on August 10, 1998, almost a year and a half had elapsed.

Before the district court, the various plaintiffs objected to the brevity of this period, asserting that the City grants lengthier amortization periods to other businesses rendered non-compliant by the City's regulatory actions. The district court held that the plaintiffs "do not have standing" to make this argument. Since the time consumed by litigation had already provided an exceedingly lengthy *de facto* amortization period, the challengers were not injured by the 180-day provision. *N.W. Enters., Inc.*, 27 F.Supp.2d at 823, 888.[27] The FTU appellees do not respond to this holding. Failure to brief the issue constitutes waiver. *See United States v. Thibodeaux*, 211 F.3d 910, 912 (5th Cir.2000).

---

[27] The district court also held that the FTU appellees failed to meet their evidentiary burden to mount a successful equal protection challenge to the ordinance. *Id.* Additionally, the district court denied the plaintiffs' motion to compel discovery, which was necessary, the plaintiffs argued, to develop this evidence. *N.W. Enters., Inc.*, 27 F.Supp.2d at 823, 889 n. 1.

The FTU appellees contest this additional holding with two alternative arguments, both of which are predicated upon the assertion that their claim is not merely an Equal Protection argument, as the district court assumed, but also a First Amendment free speech claim. FTU's assertion is that, in lieu of a comprehensive plan for land-use, the City enacts "locational restrictions" against a small number of businesses, most (if not all) of which peddle sexually oriented entertainment. Because the affected businesses are engaged in expressive conduct, actions singling them out mandate a higher level of judicial scrutiny. We reject this argument as wholly incompatible with constitutional law.

2. 120-day amortization period

Section 7(a) of 97-75 provides a 120-day grace period for arcades and mini-theatres regulated under Article II, with 30-day extensions available upon request. This provision allows existing adult mini-theatres and adult arcades time to comply with any new design and architectural restrictions. N.W. Enterprises argues that the 120-day provision inflicts an unconstitutional taking under the Fifth and Fourteenth Amendments. This court has, however, previously rejected virtually identical arguments because regulations of the structural design of SOB's do not prevent all reasonable uses of the property and thus are not takings. *SDJ, Inc.*, 837 F.2d at 1278.

3. The Failure of 97-75 to provide deadlines for hearing officials to decide applications for amortization extensions and deadlines for appeals from denial of amortization extensions.

Under § 8(c) of 97-75, businesses may seek extensions of the 180-day amortization period of § 8(a) by filing an application with a city hearing officer. The SOBs argue that § 8(c) is unconstitutional in light of *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), because it sets no definite time limit for hearings, decisions or appeals concerning applications for extension.[28] The district court held these claims moot

[28] N.W. Enterprises also complains that it is unable to take advantage of § 8's amortization provisions because Article III of 97-75 does not apply to arcades and mini-theatres. The arguments that N.W. Enterprises makes here reiterate the erroneous belief that Article III is inapplicable to adult arcades and mini-theatres, a contention we previously rejected.

because many of the requested amortization hearings had already been held and in most of them, rulings had been issued.[29] *N.W. Enters., Inc.*, 27 F.Supp.2d at 820. Alternatively, the court rejected the plaintiffs' challenge to § 8(c) on the merits. *Id.*

We agree with the SOBs that their claims are not moot: they remain subject to the provisions of 97-75, and, as the district court stated, some amortization hearings may still be pending.

However, the SOBs' argument that 8(c) is unconstitutional in light of *FW/PBS* is without merit. In *FW/PBS*, the district court overturned, as an unconstitutional prior restraint, a licensing scheme which did not require city officials to decide upon applications for SOB licenses within a definite amount of time. *FW/PBS*, 493 U.S. at 223, 110 S.Ct. at 603. The provisions of 8(c) are readily distinguishable from those in *FW/PBS*. In *FW/PBS*, a decision based on a hearing was necessary for an SOB to obtain an operating license, and the SOBs in *FW/PBS* could not operate until a decision was made. *N.W. Enters., Inc.*, 27 F.Supp.2d at 820. The hearings at issue in this case will consider applications for extensions of time to comply with new regulations beyond the period already afforded by 97-75. So long as an SOB is not closed for failure to comply with 97-75 while awaiting a decision on its application for extension, there is no unconstitutional prior restraint.

---

[29] The district court also stated that the plaintiffs lacked standing because the claims were moot. *Id.* For simplicity, we treat this issue as one of mootness, not standing.

C. Signage and Exterior Appearance Regulations

1. 97-75 and Municipal Compensation Review Board

Section 3:28-130(g) of 97-75 imposes a number of signage restrictions upon SOBs located in "commercial multi-unit centers." This provision evolved out of a concern that some SOBs were attempting to avoid the original signage restrictions placed on freestanding SOBs by converting their premises to "multi-unit centers." By extending the reach of the existing signage restrictions to multi-unit centers, the Houston City Council aimed to bring all SOBs, regardless of the type of premises they occupied, within the scope of these regulations. The district court granted summary judgment to the FTU and AHD appellees, holding that the City must follow the procedures outlined in § 216 of the Texas Local Government Code before enforcing 97-75 § 3:28-130(g). *See N.W. Enters., Inc.*, 27 F.Supp.2d at 896-99. Section 216 allows municipalities to require the "relocation, reconstruction or removal of a sign," but requires municipalities to establish "a municipal board on sign control." *See* Tex. Loc. Gov't Code Ann. § 216.004(a) (Vernon 1999). In addition, § 216 provides that "[t]he owner of a sign that is required to be relocated, reconstructed or removed is entitled to be compensated by the municipality for costs associated with the relocation, reconstruction or removal." *Id.* at § 216.003(b).

The signage restrictions that would apply to SOBs in multi-unit centers provide that "it shall be unlawful for the owner or operator of any [SOB] . . . to erect, construct or maintain any sign . . . other than one primary sign and one secondary sign." *See* HOUSTON CITY ORDINANCE 97-75 § 3:28-130(a). In addition, the restrictions prescribe

the size, content and overall appearance of the two allowable signs. *See id.* at § 3:28-130(b)-(f). For the purposes of this ordinance, a sign is defined as:

> Any display, design, pictorial or other representation, which shall be so constructed . . . that the same is visible from the outside of an enterprise and that is used to seek the attraction of the public to any goods, services or merchandise available at such enterprises . . . [and] shall also include such representations painted on or otherwise affixed to any exterior portion of an enterprise as well as such representations painted on or otherwise affixed to any part of the tract upon which such enterprise is situated.

Id. at § 3:28-121.

The City argues that § 216 is inapplicable to SOB signs in multi-unit centers because the regulation does not, by its own terms, require the "relocation, reconstruction or removal" of SOB signs. In addition, the City cites two affidavits from Ms. Ollie Schiller, the Deputy Assistant Director in the Sign Administration of the Public Works and Engineering Department and Sign Administrator for the City of Houston, which indicate the signs in question would not require relocation, reconstruction and removal to comply with 97-75 § 3:28-130. The City argues that Ms. Schiller's opinion is entitled to great deference as she is in charge of enforcing signage restrictions in Houston. It is true that courts often afford agencies substantial deference in the interpretation of statutes that they are charged with enforcing. *See, e.g., Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). However, the City incorrectly invokes *Chevron* deference here. While Ms.

Schiller's agency enforces Houston's restrictions on signs, it is not charged with the enforcement of the provisions of § 216. Rather, when a municipal board on sign control is established under § 216, it is entitled to "determine the amount of compensation to which an owner of a sign that is required to be relocated, reconstructed or removed." *See* Tex. Loc. Gov't Code Ann. § 216.005. As a result, Ms. Schiller's interpretation of what constitutes "relocation, reconstruction or removal" of a "sign" for the purposes of the provisions of § 216 does not control this court's determination of the matter.

The state statute is, as the district court noted, somewhat vague on the types of signs it covers – e.g., whether principally freestanding billboards or all signs that "advertise" or "inform" the public. *Compare* § 216.006 (compensation for relocated sign includes "dismantling" and "transporting" it to another site) with § 216.002 (definitions of "sign," "on-premise sign" (defined as "freestanding") and "off-premise sign"). Further, the parties' briefs dispute whether the ordinance's provisions will require the "relocation, reconstruction or removal" of the signs at issue, or will merely demand de minimis alterations. We express no opinion on these or other questions of fact and state law that are best resolved by a sign control board and state courts in the first instance. We essentially agree with the district court's decision and hold that the City may not enforce § 28-130(g), as amended to include multi-unit centers, without first designating a sign board to oversee compliance with Texas Local Government Code § 216.

2. Constitutionality of signage and exterior appearance restrictions.

The SOBs challenge the district court's holding that §§ 28-129 and 28-130 of 97-75 are constitutional. Section 28-129 governs the exterior appearance of SOBs. This provision is unchanged from the exterior appearance provision that SOBs unsuccessfully challenged in *SDJ, Inc.*, 837 F.2d 1268. Like the district court, we are bound by prior decisions of this court.

The plaintiffs also challenge the constitutionality of § 28-130's limitations on SOBs' exterior signage. Substantively, the ordinance's restrictions on signage are identical to provisions upheld in *SDJ, Inc.*, but § 28-130(g) extends the signage provisions to SOBs located in commercial multi-unit centers. This extension is irrelevant for constitutional purposes. If the restrictions are constitutional as to SOBs in stand-alone buildings, the fact that an SOB is located in a multi-unit building cannot make the same restrictions unconstitutional.

3. Regulations forbidding obstruction of entrances within an SOB, e.g. 97-75 § 3:28-136(b)

Provisions of 97-75 including § 3:28-136(b) require entrances to entertainment rooms to be free of obstacles, including doors.[30] The district court held this requirement

[30] Ordinance 97-75 § 3:28-136(b) ("It shall be unlawful for any owner, operator or manager of any enterprise to permit any employee to provide any entertainment to any customer in any separate area within an enterprise to which entry or access is blocked or obscured by any door, curtain or other barrier, regardless of whether entry to such separate area is by invitation, admission fee, club membership fee or

(Continued on following page)

facially valid under an intermediate scrutiny standard, because the restrictions were narrowly tailored to the governmental purpose. *N.W. Enters., Inc.*, 27 F.Supp.2d at 824-27; *see also* at 892-95.

One of the appellees, Ice Embassy, Inc., complained that this requirement is nevertheless unconstitutional as applied to its proposed construction of a "VIP room" in its facility. The room, as designed, would be large (4,000 square feet, seating more than 200 patrons), would be surrounded on all four sides by the main room, would be constructed with clear walls, and would be accessible by way of a clear, heavy, non-locking door. The City appears to concede that this proposed room conforms to §§ 3:28-136(b) and 28-258(c) in every respect except in having a door.

The district court agreed with Ice Embassy, holding the prohibition of a door unconstitutional as applied to large "VIP rooms." The court's conclusion, however, is tainted by its erroneous application of strict scrutiny review.[31]

In defense of the district court's analysis, Ice Embassy emphasizes that "an essential element of the erotic dance

---

any form of gratuity or consideration."); *id.* at § 28-258(c) ("It shall be unlawful for any employee to engage in entertainment or to expose any specified anatomical areas or engage in any specified sexual activities in the presence of a customer in any separate area within an enterprise to which entry or access is blocked or obscured by any door, curtain or other barrier separating entry to such area from any other area of the enterprise.").

[31] Absent a legislative finding regarding such "secondary effects" of large VIP rooms, the court concluded, this restriction is "content-based," subject to "strict scrutiny," and unconstitutional. *N.W. Enters., Inc.*, 27 F.Supp.2d at 892-95.

expression . . . is the musical accompaniment," and Ice Embassy aims for a different musical ambience in each of the "rooms" created by the plastic wall. The purpose of the door is thus to minimize ambient noise.

The City contests the district court's reading of the record and the court's legal analysis. Testimony before the City Council graphically demonstrated the use of larger "VIP rooms" for prostitution. Moreover, the City asserts it could have imposed greater restrictions on these rooms (including complete prohibition), but it chose to permit them, requiring only easy access through unobstructed entrances. Finally, the First Amendment protects topless dancing from clothing, not musical accompaniment from ambient noise.

The City's arguments are persuasive. As we have previously explained, the district court should have applied intermediate scrutiny to these content-neutral regulations. The court's misapplication of the strict scrutiny standard led it to ignore the evidence that separate rooms, even large ones, can be and have been used for prostitution. Under the test of intermediate scrutiny, there is an appropriate fit between the means (lack of obstacles) and ends (enforcement of prostitution laws) in the City's regulation.

D. Preemption of the regulation of businesses housing "adult arcades and adult mini-theatres" imposed by 97-75 Article II

N.W. Enterprises argues that Article II of 97-75, which regulates adult arcades and adult mini-theatres, is preempted by Texas Local Government Code § 243.005 because the Ordinance discriminates against them "on the

basis" of their coin-operated machines. Section 243.005 states, in pertinent part, that a "regulation adopted under this chapter may not discriminate against a business . . . on the basis of whether it contains one or more coin-operated machines." Tex. Loc. Gov't Code Ann. § 243.005(b) (Vernon 1999). Further, a "business is not exempt from regulation under this chapter . . . because it contains one or more coin-operated machines." *Id.* at § 243.005(a).[32]

The district court granted summary judgment to the City, reasoning that the basis for 97-75 Article II's regulation of "adult arcades and adult mini-theatres" is their provision of adult entertainment, not possession of coin-operated machines. *SDJ, Inc.* rejected a similar preemption challenge to a zoning ordinance affecting alcohol-serving establishments: "the Ordinance does not regulate

---

[32] Business Licensed Under Alcoholic Beverage Code: Business Having Coin-Operated Machines

> (a) A business is not exempt from regulation under this chapter because it holds a license or permit under the Alcoholic Beverage Code authorizing the sale or service of alcoholic beverages or because it contains one or more coin-operated machines that are subject to regulation or taxation, or both, under Chapter 8, Title 132, Revised Statutes.
>
> (b) A regulation adopted under this chapter may not discriminate against a business on the basis of whether the business holds a license or permit under the Alcoholic Beverage Code or on the basis of whether it contains one or more coin-operated machines that are subject to regulation or taxation, or both, under Chapter 8, Title 132, Revised Statutes.
>
> (c) This chapter does not affect the existing preemption by the state of the regulation of alcoholic beverages and the alcoholic beverage industry as provided by Section 1.06, Alcoholic Beverage Code.

Tex. Loc. Gov't Code Ann. § 243.005 (Vernon 1999).

the land use of these businesses on the basis of their alcohol use, but regulates them as a result of the secondary affects [sic] they have on surrounding areas." *N.W. Enters., Inc.*, 27 F.Supp.2d at 790 (quoting *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359, 1373-74 (S.D.Tex.1986)); *see also SDJ, Inc.*, 837 F.2d at 1280.

Additionally, § 243.005(a) of the Texas Local Government Code explicitly forecloses the preemption argument that N.W. Enterprises presents. Section 243.005(a) explicitly states that a business is not exempt from municipal regulations enacted pursuant to chapter 243 of the Local Government Code because it contains coin-operated machines that are subject to regulation under other statutes. Since 97-75 was enacted by the City of Houston under the authority of Chapter 243, adult arcades and adult mini-theatres are not exempt from its provisions based on the fact that they contain coin-operated machines.

N.W. Enterprises also argues that 97-75's location and distance requirements violate another state law. Specifically, they contend, under § 2153.452 of the Texas Occupations Code[33] the City may not prohibit the location of coin-operated machines more than 300 feet from churches, schools, or hospitals. *See B & B Vending Co. v. City of Garland*, 711 S.W.2d 132, 134 (Tex.App. – Tyler 1986, writ ref'd n.r.e.). The statute provides that

> (a) For purposes of zoning, a political subdivision of this state shall treat the exhibition of a

[33] The parties and the district court refer to this statute as Tex.Rev.Civ. Stat. Ann. art. 8814. It was repealed and codified as section 2153.452 in 1999. *See* Act of May 13, 1999, 76th Leg. R.S., ch. 388, § 6(a), 1999 Tex. Gen. Laws 2439-40.

> music or skill or pleasure coin-operated machine in the same manner as the political subdivision treats the principal use of the property where the machine is exhibited.
>
> (b) Subsection (a) does not prohibit a municipality from restricting the exhibition of a coin-operated amusement machine within 300 feet of a church, school, or hospital.

Tex. Occ. Code Ann. § 2153.452 (Vernon 2003).

This argument is refuted by the statute itself. As noted earlier, the City enacted 97-75 pursuant to authority granted under Chapter 243 of the LOCAL GOVERNMENT CODE. Section 243.005(a) states that businesses are not exempt from ordinances enacted pursuant to Chapter 243 even though they contain coin-operated machines that are also subject to regulation under 2153.452.[34] *B & B Vending Company* is distinguishable because the ordinance at issue in that case was not a regulation of SOBs. *B & B Vending Company,* 711 S.W.2d at 133 (coin-operated machine owner sought a permit to put video games in a fast food restaurant). Thus, § 243.005(a)'s exemption was unavailable to the City to defend its regulation in that case. In sum, we affirm the district court's holding that the provisions of 97-75 are not preempted either by Texas Local Government Code § 243.005(b) or Texas Occupations Code § 2153.452.

---

[34] Section 243.005(a) actually refers to coin-operated machines subject to regulation under Chapter 8, Title 132 of the Revised Statutes. Section 2153.452, however, is a codification of article 8814 which was part of Chapter 8, Title 132. Thus, the exemption of § 243.005(a) necessarily extends to businesses regulated under § 2153.452.

E. Stay of enforcement of 97-75 after court rulings

In *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), the Supreme Court held that any restraint of SOBs prior to judicial review must be limited to a specified brief time period. This court, interpreting this requirement, has held: "Maintaining the status quo means in our view that the County cannot regulate an existing business during the licensing process." *TK's Video, Inc. v. Denton County, Tex.,* 24 F.3d 705, 708 (5th Cir.1994). Section 8(a) grants non-complying SOBs a 180-day enforcement moratorium for certain provisions of 97-75. The FTU plaintiffs argue that, while this 180-day moratorium might otherwise be valid, the unusual procedural posture of this case condemns it here. The posture and argument is this: The district court invalidated the ordinance's locational restrictions upon enactment. If the ordinance is upheld, the FTU plaintiffs still have the right to a stay-of-enforcement for a certain period of time after this court's ruling. Because the ordinance does not specifically provide for such a contingency, it is constitutionally invalid.

The district court ruled against the FTU plaintiffs, finding that a 180-day delay more than satisfied *TK's Video*'s limited stay-of-enforcement requirement: "Nothing in *TK's Video* supports Plaintiffs' novel argument that the City was required to build into its Ordinance additional periods of delay contingent on various possible judicial rulings regarding the Ordinance's validity." *N.W. Enters., Inc.,* 27 F.Supp.2d at 888. We agree. *TK's Video* merely grants non-complying businesses "a fair opportunity to complete the administrative process and access courts within a brief period." *TK's Video,* 24 F.3d at 709.

N.W. Enterprises makes a similar argument regarding the grace periods embodied in §§ 7(a) and 9(a) of 97-75. The employee licensing provisions and the structural, visibility, and lighting provisions for adult arcades and adult mini-theatres were originally to become effective on or about May 15, 1997, 120 days after the passage of the ordinance. 97-75: §§ 7(a), 9(a). On account of the pending litigation, the City did not enforce the ordinance until the district court ruled on the City's summary judgment motion and the various cross-motions for summary judgment. *N.W. Enters., Inc.*, 27 F.Supp.2d at 767. After finding most of the licensing provisions constitutional, the district court allowed the City to begin enforcement of these restrictions on June 5, 1998, over a year after initial enforcement was to begin. *Id.* at 900. Upon finding the entirety of the arcade and adult mini-theatre provisions to be constitutional, the trial court allowed the City to begin overall enforcement against these entities.

Before this court, N.W. Enterprises argues that the district court committed fundamental error and violated due process by allowing one part of the ordinance to be enforced in advance of the others. In support of this proposition it cites *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Because we find no support for this proposition in *O'Brien* or in the other cases that N.W. Enterprises cites, we find no error in the district court's handling of the enforcement of these regulations.

IV. Employee Licensing

The Ordinance requires each manager and entertainer of SOBs to obtain a permit and to display it conspicuously

upon himself or herself while working. The City must issue a permit within 10 days from the date of application unless the applicant has been convicted of or spent time in jail for an enumerated offense within the last five years. The SOBs and employees challenge various aspects of the permit requirements, and the City contends that the district court erred in enjoining several aspects of this regulation.

In this section, we affirm the judgment upholding the constitutionality of the Ordinance's permit requirements. We reverse the judgement insofar as it has enjoined the City from (a) requiring permit applicants to disclose their phone numbers and home addresses on permit applications and (b) requiring managers to conspicuously display their identification cards while working in SOBs. We vacate the injunction prohibiting the City from disclosing information on permit applications because the appellees have an adequate legal remedy under state law. We also vacate as moot the injunction prohibiting the City from requiring applicants to disclose information on permit applications beyond that used by the Ordinance to determine permit eligibility, because the City has revised its application forms.

A. Licensing Procedures

1. Ten-day processing period

FTU[35] contends that the district court should have analyzed the validity of the 10-day time period for processing permit applications in § 28-254(c) of the Ordinance

[35] FTU appellees include individuals who work in SOBs and are subject to the licensing requirements.

under strict scrutiny. The district court, however, correctly classified the permit requirements as content-neutral provisions subject to intermediate scrutiny. Specifically, the legislative record reflects that entertainers in SOBs may often be more likely to engage in prostitution and illegal lewd behavior, and managers, to some extent, can control entertainers' behavior.

Viewed under a standard of intermediate scrutiny, we disagree with FTU's contention that the 10-day processing period is excessive. The period is well within the 60-day processing period upheld by this court in *TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705 (5th Cir.1994). FTU concedes that *TK's Video* is binding precedent on the permissible delay in processing *business* permits but would distinguish its applicability to *individual* permits. *TK's Video* might not strictly control, because processing a business permit application may be more complex and time-consuming than processing the permit of an individual, yet that circumstance supports a shorter time period for processing licenses for individuals. A 10-day processing period for individual permits is reasonable by comparison and does not impose an undue burden. Under intermediate scrutiny, the least restrictive means need not be employed.

FTU relies on *Kev, Inc. v. Kitsap County,* 793 F.2d 1053 (9th Cir.1986), to support its argument that the 10-day processing period for entertainer and manager permit applications is excessive and, thus, renders the permit requirements impermissible prior restraints. In *Kev,* the Ninth Circuit concluded that a five-day delay in issuing dancer permits was unconstitutional because Kitsap County did not demonstrate a need for the delay. *Id.* at 1060. Contrary to *Kev,* the record in this case indicates

that the time required to do certain background checks justifies the 10-day processing period.

2. Written requests for temporary permits

Section 28-254(f) of the Ordinance provides that if the City does not issue or deny a permit within the 10-day processing period, it must immediately issue a temporary permit upon written request by the applicant. FTU argues that the permit requirements are unconstitutional prior restraints on expression because requiring an applicant to submit a written request for a temporary permit is not the least restrictive method for dealing with an untimely response by the City.[36] When analyzing the validity of a content-neutral licensing scheme, however, this circuit does not require that the least restrictive means be implemented. *See TK's Video,* 24 F.3d at 707-708. Because the ordinance requires the immediate issuance of a temporary license upon written request by an applicant, the Ordinance does not place an undue burden on license applicants.

3. Days and times for permit application and renewal

Section 28-254(a) of the Ordinance provides that individuals who want to obtain or renew entertainer or

[36] FTU suggests two less restrictive alternatives. First, the City could allow applicants whose permits have not been issued by the end of the tenth day to immediately begin work on the eleventh day without submitting a request in writing. Alternatively, the City could issue temporary permits when applicants turn in their permit applications so that applicants can work while they wait for their applications to be processed.

manager permits can do so between the hours of 8:00 a.m. and 12:00 p.m. on Monday, Wednesday, or Friday. FTU argues that the permit requirements are facially unconstitutional content-based restraints on expression to the extent that the Ordinance discriminates in the days and times during which individuals can apply for permits. We agree with the district court that FTU's complaint does not rise to the magnitude of a constitutional violation.

4. Burden of seeking judicial review of a permit denial and burden of proof in court

FTU argues that the Ordinance's dancer and manager permit requirements are unconstitutional because § 28-254(e) places the burden of seeking judicial review of permit denials on permit applicants rather than on the City; FTU also argues that the City should bear the burden of proof in court. In *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Supreme Court set forth three procedural safeguards to protect against unlimited suppression of constitutionally protected speech by a motion picture censorship board. First, any restraint before judicial review occurs can be imposed only for a specified brief period during which the status quo must be maintained; second, prompt judicial review of that decision must be available; and third, the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof in court. *Freedman,* 380 U.S. at 58-59, 85 S.Ct. at 739, 13 L.Ed.2d at 654-55.

In *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), Justice O'Connor, joined by two other Justices on the issue, dispensed with the third *Freedman* requirement when analyzing the validity of an SOB licensing scheme. *FW/PBS,* 493 U.S. at 229-30,

110 S.Ct. at 607, 107 L.Ed.2d at 621. This circuit has followed Justice O'Connor in applying only the first two *Freedman* procedural safeguards when dealing with a licensing scheme that does not present the grave dangers of a censorship system. *See, e.g., Encore Videos, Inc. v. City of San Antonio,* 310 F.3d 812, 823 (5th Cir.2002); *TK's Video,* 24 F.3d at 707-08. Other circuits have also concluded that the third *Freedman* procedural safeguard does not apply to licensing schemes that do not directly regulate content. *See, e.g., MacDonald v. City of Chicago,* 243 F.3d 1021, 1035-36 (7th Cir.2001); *Ward v. County of Orange,* 217 F.3d 1350, 1355 (11th Cir.2000); *Steakhouse, Inc. v. City of Raleigh,* 166 F.3d 634, 640-41 (4th Cir.1999) (in the context of an administrative process).

FTU urges this court to apply the third *Freedman* procedural safeguard to the Ordinance's entertainer and manager permit requirements, contending that individual managers and dancers have less motivation and significantly less economic wherewithal than the SOB plaintiffs in *FW/PBS* to seek judicial review of permit denials. In *FW/PBS,* Justice O'Connor considers the degree of motivation that an unsuccessful applicant would have to seek judicial review of an adverse administrative decision, but she dispenses with the third *Freedman* safeguard primarily because "[u]nder the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech." *FW/PBS,* 493 U.S. at 229, 110 S.Ct. at 607, 107 L.Ed.2d at 621. While the censor in *Freedman* engaged in presumptively invalid direct censorship of expressive material, the city in *FW/PBS* simply engaged in the ministerial, nondiscretionary act of reviewing the general qualifications of license applicants. Similarly, the issuance of manager and entertainer permits

under Houston's ordinance is a nondiscretionary act that does not require the City to pass judgment on the content of any protected speech.[37] The third *Freedman* procedural safeguard therefore does not apply; the City need not bear the burden of seeking judicial review of a permit denial nor the burden of proof in court.

B. Information on permit applications

1. Confidentiality

The Texas Public Information Act (TPIA) gives the public the right to obtain information in government records unless the "information [is] considered to be confidential by law, either constitutional, statutory, or by judicial decision." Tex. Gov't Code § 552.101. The district court declared the information provided by entertainers and managers on their permit applications confidential under the TPIA, and then enjoined the City from disclosing such information. We reverse the injunction because the appellees have an adequate legal remedy under the TPIA. 11A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2942 at 44 (1995) ("[T]he main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no legal remedy."). Because the district court declared the information on entertainer and manager permit

[37] Because the issuance of entertainer and manager permits under the Ordinance is a nondiscretionary act that does not involve passing judgment on the content of protected speech, FTU's reliance on *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) is also misplaced. The Supreme Court placed the burden of proof on the State in *Speiser* because the State was denying tax exemptions to veterans if they did not sign an oath stating that they did not advocate the overthrow of the government by unlawful means.

applications confidential under the TPIA, the City cannot disclose it to the public. There is no need for the injunction.

2. Phone numbers and home address

The district court enjoined the City of Houston from requiring permit applicants to disclose their phone numbers and home addresses on permit applications. We reverse the district court's injunction. The appellees' concern that their phone numbers and home addresses may be disclosed to stalkers, overly-aggressive suitors, or people zealously opposed to SOBs does not justify the injunction because the information on permit applications is confidential under the TPIA. Moreover, the information is substantially related to the law enforcement and administrative needs of the City.

AHD, FTU, and Dee & Dee argue that the district court properly enjoined the City from requiring entertainers and managers to disclose their phone numbers and home addresses on permit applications under *TK's Video.* In *TK's Video,* this court upheld a licensing scheme that required owners and employees of SOBs to provide information about their age and certain regulatory infractions and sexual offenses because such information "substantially relates to the substantial government interest of curtailing pernicious side effects of adult businesses." *TK's Video,* 24 F.3d at 710. That the Denton County order at issue in *TK's Video* did not require license applicants to disclose their phone numbers and home addresses does not mean such information may not be required. While § 8-254(a)(1) requires permit applicants to disclose their home and mailing addresses, the Ordinance does not require

permit applicants to disclose their phone numbers, but, under the standard set forth in *TK's Video,* the City can require the disclosure of such information because there is a "'relevant correlation' or 'substantial relation' between the information required and the government interest." *Id.* The information may not be necessary to conduct criminal background checks or to ensure that SOBs do not hire underage employees, but it is highly relevant to the ability of law enforcement officers to investigate criminal activity in SOBs.

The information also substantially relates to the City's ability to comply with the notice requirement of the Ordinance. The appellees argue that the City can send the required notice to an address other than an applicant's home address, but the least restrictive means of complying with the notice requirement need not be employed. There is a substantial relation between the information sought and the City's interest; we therefore reverse the district court injunction.

3. Criminal History

Under § 28-254(c) of the Ordinance, the City can deny an applicant a permit based on a conviction for certain criminal acts or jail time served for such acts during the preceding five years. Dee & Dee argues that the district court incorrectly upheld the Ordinance's permit disqualification provision under *TK's Video.* Dee & Dee reads *TK's Video* to allow criminal background checks solely to monitor individuals working in SOBs but not to serve as grounds for permit disqualification and argues that the district court decision conflicts with prior Supreme Court and Fifth Circuit precedent. We disagree. The licensing

scheme at issue in *TK's Video* allowed the county director to deny a permit to an applicant if the applicant or the applicant's spouse had been convicted of certain enumerated crimes or had been released from jail for such a conviction within two years for a misdemeanor offense or within five years for a felony offense. This court concluded that histories of misconduct are "plainly correlated with the side effects that can attend [adult] businesses, the regulation of which was the legislative objective. . . . [E]nds and means are substantially related[,] . . . assur[ing] a level of scrutiny appropriate to the protected character of the activities and sluic [ing] regulation away from content, training it on business offal." *TK's Video,* 24 F.3d at 710. Under *TK's Video,* the district court properly upheld the Ordinance's permit disqualification provision.

As explained earlier, the Ordinance allows the City to deny a permit to an applicant who has either been convicted of or spent time in jail for an enumerated crime during the preceding five years. The City's initial permit application, however, required applicants to disclose information beyond that used by the Ordinance to determine permit eligibility. The district court therefore enjoined the City from requiring permit applicants to disclose criminal convictions obtained more than five years before the application, convictions for crimes other than those enumerated in the Ordinance, and time spent in jail for an offense other than one of the enumerated crimes. *N.W. Enters., Inc.,* 27 F.Supp.2d at 858. Even after the City revised its permit applications to accord with the limitations set by the Ordinance, the district court denied the City's motion to reconsider the injunction. *Id.* at 901. We vacate the district court injunction as moot because the permit application no longer requires applicants to disclose

the information covered by the injunction. *See Doe v. Marshall,* 622 F.2d 118, 120 (5th Cir.1980); *Sannon v. United States,* 631 F.2d 1247, 1249 (5th Cir.1980).

C. Conspicuous Display of Manager Identification Cards

Section 28-256 of the Ordinance requires each manager or entertainer to conspicuously display a personal identification card while working. The district court upheld the conspicuous display requirement with regard to entertainers as a permissible content-neutral regulation that is narrowly tailored to serve the City's substantial interest in ensuring that only licensed entertainers work in adult businesses. With regard to managers, however, the district court struck down the requirement under strict scrutiny, concluding that the legislative record contains no justification for the requirement for managers. After reviewing the record, we disagree with the district court. Aside from its methodological error in determining what level of scrutiny to apply, the court overlooked evidence in the legislative record that supports the need for the conspicuous display requirement for managers.

Managers monitor entertainers and play an important role in ensuring that they do not engage in illegal activity. According to the record, though, some managers "look the other way" while entertainers perform lewd dances or illegal sexual acts.[38] Law enforcement officers must be able

[38] At Houston City Council SOB Committee Meeting on August 26, 1999, a number of vice officers testified to the activities taking place at these clubs. For example, Vice Officer C testified that entertainers often "ask [the patron] to give them some money to tip the manager or the floor person so that they will look the other way while they perform a

(Continued on following page)

to determine from a distance quickly, and without being intrusive, whether both entertainers and managers of clubs are engaging in or permitting illegal activity. The conspicuous display requirement is narrowly tailored to serve this important government interest. Managers need not display their real names but do need to furnish a picture and identification number on their identification cards. We reverse the district court decision on the unconstitutionality of the conspicuous display requirement for managers and hold that the City can require managers to conspicuously display their identification cards while working.[39]

---

table dance." *See* R. Doc. 81, Ex. 8E at 88. Vice Officer A testified that the officers had "heard of occasions where the dancers told us that they pay extra to management personnel, floor persons, bartenders, waiters to look the other way to make sure that no one know or to warn them that someone is coming up the that they don't know." *Id.* at 92-93. Indeed, Officer A noted that he had "one experience personally where the two dancers spoke in front of me and asked if they thought the waitress was cool because she wouldn't tell on them or if the manager knew and he said it was cool. In turn, these two persons were willing to perform sex acts on me at the club at the time. They wanted to go through with it. I had to get out of it and did not want to go through with it." *Id.* at 93. According to Officer A, these entertainers went beyond mere suggestion when he "observed [them] along with another dancer engaged in sex with one another as well as [being] willing to engage in sex with [individuals] who they thought were my business partners, but were other police officers." *Id.* at 93. In addition, Vice Officer B testified that at one particular club that the Houston Police Department investigated, "the manager also looked the other way as the girls performed table dances for us. So, I'm sure the management did know what was going on." *Id.* at 92.

[39] AHD argues that the district court erred in upholding the Ordinance's manager and entertainer permit requirements under Article I, Section 8 of the Texas Constitution because they are not the least restrictive means of achieving the City's interests. This argument is without merit. As we noted earlier, the Texas Constitution does not

(Continued on following page)

CONCLUSION

The district court's rulings in this case are extensive and clearly reflect hard work and thoughtfulness. Upon review of the voluminous briefs and record, we AFFIRM the judgment of the district court in its entirety[40] with the following exceptions. First, we REVERSE the district court's ruling enjoining enforcement of the amended 1,500-foot distance restriction and remand for a determination whether that restriction, in light of the Ordinance as a whole, affords reasonable alternative avenues of communication for SOBs. Second, we DISMISS the cross-appeal of the Court's non-final rulings on the constitutionality of the public parks and multi-family residence provisions. Third, we REVERSE the court's invalidation of 97-75's interior design restrictions related to large VIP rooms. Fourth, we REVERSE the court's invalidation of the requirements that (a) permit applicants disclose phone numbers and home addresses on their applications, and (b) managers conspicuously display their identification cards while at work in SOBs. Finally, we VACATE the court's injunction prohibiting the City from disclosing information on permit applications and requiring applicants to disclose information beyond that required by 97-75.

---

provide broader rights than the First Amendment with regard to SOBs, and there is no plausible reason for construing the state constitution differently with respect to SOB managers and entertainers.

[40] We affirm the district court's decision to require the formation of a sign control board pursuant to Texas Local Government Code § 216, but we express no opinion on the scope of the Texas statute or its applicability to signs involved in the amended § 28-130(g).

AFFIRMED in Part, DISMISSED in Part, REVERSED in Part, VACATED in Part, and REMANDED in Part.